(15)

No. 93-1613-CFX
Status: GRANTED

Title: Eugene A. Ludwig, Comptroller of the Currency, et al., Petitioners
v.
Variable Annuity Life Insurance Company, et al.

Docketed:
April 13, 1994

Court: United States Court of Appeals for the Fifth Circuit

Vide:
93-1612

Counsel for petitioner: Solicitor General, Rosenthal,Steven S.

Counsel for respondent: Stewart,David Overlock, Kappler,Ann M., Dollase,Ellen D., Rosenthal,Steven S., Roderer,David W., Eddman,Theodore

See appdx in 93-1612.

Entry	Date	Note	Proceedings and Orders
1	Apr 13 1994	G	Petition for writ of certiorari filed.
2	May 12 1994		Brief amici curiae of American Bankers Association, et al. filed. VIDED.
3	May 13 1994		Brief amici curiae of Conference of State Bank Supervisors, et al. filed. VIDED.
4	May 13 1994		Brief of respondent Variable Annuity Life Insurance Company in opposition filed. VIDED.
6	May 13 1994		Brief amicus curiae of New York Clearing House Assn. filed. VIDED.
5	May 18 1994		DISTRIBUTED. June 3, 1994 (Page 1)
7	Jun 1 1994	X	Reply brief of petitioners filed.
8	Jun 6 1994		Petition GRANTED. **
9	Jun 16 1994	G	Motion of petitioners to dispense with printing the joint appendix filed.
18	Jun 16 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit (BOX)
10	Jun 27 1994		Motion of petitioners to dispense with printing the joint appendix GRANTED.
12	Jul 20 1994		Order extending time to file brief of petitioner on the merits until July 29, 1994.
13	Jul 29 1994		Brief of petitioners Nationsbank of North Carolina, N.A., et al. filed. VIDED.
14	Jul 29 1994		Brief amici curiae of American Bankers Association, et al. filed. VIDED.
15	Jul 29 1994		Brief amici curiae of Conference of State Bank Supervisors, et al. filed. VIDED.
16	Jul 29 1994		Brief amicus curiae of New York Clearing House Association filed. VIDED.
17	Jul 29 1994		Brief of Federal petitioners filed. VIDED.
20	Aug 5 1994		Order extending time to file brief of respondent on the merits until September 8, 1994.
21	Aug 16 1994	G	Motion of the Solicitor General for divided argument filed.
22	Aug 19 1994		Record filed.

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No. 93-1613-CFX

Entry	Date	Note	Proceedings and Orders
		*	Original record proceedings U.S. District Court for the Southern District of Texas (SEALED ENVELOPE) (BOX)
23	Sep 7 1994		Brief amicus curiae of American Academy of Actuaries filed. VIDED.
24	Sep 7 1994		Brief amicus curiae of National Association of Insurance Commissioners filed. VIDED.
25	Sep 8 1994		Brief amici curiae of National Association of Life Underwriters, et al. filed. VIDED.
27	Sep 8 1994		Brief amicus curiae of American Council of Life Insurance filed. VIDED.
28	Sep 8 1994		Brief amicus curiae of American Land Title Association filed. VIDED.
29	Sep 8 1994		Brief amici curiae of Tom Gallagher, et al. filed. VIDED.
30	Sep 8 1994		Brief of respondents Variable Annuity Life Insurance Comany, et al. filed. VIDED.
31	Sep 26 1994		Motion of the Solicitor General for divided argument GRANTED.
32	Sep 30 1994		CIRCULATED.
33	Oct 7 1994		SET FOR ARGUMENT WEDNESDAY, DECEMBER 7, 1994. (1ST CASE).
34	Oct 11 1994	X	Reply brief of Federal Petitioners filed. VIDED.
35	Oct 11 1994	X	Reply brief of petitioners Nationsbank of North Carolina, N.A., et al. filed. VIDED.
36	Dec 7 1994		ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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31 pp

QUESTION PRESENTED

Whether federal law permits national banks, wherever located, to act as agents in the sale of annuities.

PARTIES TO THE PROCEEDING

The petitioners are Comptroller of the Currency Eugene Ludwig (substituted as a party pursuant to Rule 35.3), the Office of the Comptroller of the Currency, and the United States. The respondents are the Variable Annuity Life Insurance Company and, under Rule 12.4, NationsBank of North Carolina, N.A., and NationsBanc Securities, Inc., intervenor-defendants below. We are advised that the respondents who were intervenor-defendants below also intend to seek review of the judgment in this case.

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TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, the Comptroller of the Currency, and the Office of the Comptroller of the Currency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (NBNC Pet. App. 1a-17a)[1] is reported at 998 F.2d 1295. That court's order denying rehearing and rehearing en banc, and the opinion dissenting therefrom (NBNC Pet. App. 18a-28a), are reported at 13 F.3d 833. The

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[1] "NBNC Pet. App." refers to the appendix to the petition for a writ of certiorari in *NationsBank of North Carolina, N.A., et al.* v. *Variable Annuity Life Insurance Co.* (filed April 13, 1994), which seeks review of the same decision of the court of appeals.

opinion of the district court (NBNC Pet. App. 29a-34a) is reported at 786 F. Supp. 639. The approval letter of the Office of the Comptroller of the Currency (NBNC Pet. App. 35a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. A petition for rehearing was denied on January 13, 1994. NBNC Pet. App. 18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 5136 of the Revised Statutes of 1878, 12 U.S.C. 24, provides in pertinent part as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of

title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock[.]

2. Section 13, par. 9, of the Federal Reserve Act, Act of Dec. 23, 1913, ch. 6, 28 Stat. 263 (as added by Act of Sept. 7, 1916, ch. 461, 39 Stat. 753), as amended by Act of Oct. 15, 1982, Oct. 15, 1982, Pub. L. No. 97-320, Tit. IV, § 403(b), 96 Stat. 1511, to be codified at 12 U.S.C. 92, provides as follows:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies

issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

STATEMENT

1. This litigation involves a challenge to the Comptroller of the Currency's approval of an application by the corporate predecessors of respondents NationsBank of North Carolina, N.A., and its brokerage subsidiary, NationsBanc Securities, Inc. (collectively, NationsBank), for permission for the subsidiary to act as an agent for customers in the purchase of various types of fixed and variable annuities.

Annuities are contracts under which a purchaser makes one or more premium payments to the issuer, in return for which the issuer promises to make one or more payments back to the purchaser when the contract matures. In a classic "fixed" annuity, the issuer promises to make equal payments of a predetermined amount at regular intervals, commencing at maturity of the contract and continuing until the death of the purchaser or some designated beneficiary. The amount of the payments under such a contract is generally calculated so that a purchaser or beneficiary dying at the actuarially predicted time will receive back, over his life, an amount equal to the total premium paid, less applicable expenses and fees, plus interest at a predetermined rate.[2] The pur-

[2] Modern "fixed" annuity contracts, including all those at issue in this case, often provide both for a low guaranteed minimum interest rate and for "excess" interest, payable at the issuer's discretion at whatever rate it may set from time to time. See NBNC Pet. App. 36a-37a & n.1.

chaser of such a contract thus relinquishes control over the invested premium and bears the risk that he or the beneficiary will die before recovering the entire investment, in exchange for the issuer's guaranty of specified payments to the date of death, and its assumption of the risk that the purchaser or beneficiary will live longer than predicted and thus increase the return on the purchaser's investment.

There are many forms of "variable" annuity. In a typical case the issuer promises to segregate premiums received from the purchaser and invest them, over the life of the contract, as directed by the purchaser—for example, in one or more of several mutual funds. The value of the purchaser's annuity at maturity is determined by the performance of those investments; thus, the purchaser retains both investment control and the associated risk of gain or loss. At maturity, the purchaser usually has several options for recovering the accumulated (or remaining) value of the account, including receiving it as a lump sum, in level periodic payments calculated in the same manner as for a fixed annuity, or in variable payments continuing for the life of the purchaser or a designated beneficiary. See generally NBNC Pet. App. 35a-36a; Office of the Comptroller of the Currency (OCC), Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 at 71,211 (1990) (OCC Letter 499) (describing annuities involved in this case); *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 69-72 & n.13 (1959).

Both fixed and variable annuities are covered by an unique and complex set of federal income tax rules that generally allow for deferral of tax on the investment returns allocable to a purchaser's annuity

premiums until those returns are withdrawn during the payout phase of the contract. See 26 U.S.C. 72. Because the tax rules also generally provide for penalties if an annuity investment is withdrawn before the purchaser is 59 1/2 years old, and for unfavorable tax treatment of amounts withdrawn before the maturity of the contract, see 26 U.S.C. 72(e) and (q), annuities are frequently marketed as tax-sheltered means of saving for retirement. See NBNC Pet. App. 38a.

2. NationsBank proposed to act as a sales agent for (not as issuer of) a variety of annuity contracts that would allow purchasers to design "a flexible, multi-faceted investment package comprised of variable and fixed annuity options." NBNC Pet. App. 37a. The OCC Chief Counsel's interpretive letter underlying the approval of NationsBank's application (see *id.* at 35a) noted that the Comptroller had previously approved the sale of variable annuities by national banks, on the ground that "variable annuity contracts are securities, functionally resembling shares in a mutual fund, and * * * banks are authorized, pursuant to 12 U.S.C. 24(7) to buy and sell securities for the account of customers." OCC Letter 499, at 71,211, citing OCC, Interpretive Letter No. 331, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985) (OCC Letter 331). The additional analysis provided by the Chief Counsel's letter and the Comptroller's approval in this case therefore focused on NationsBank's proposal to market fixed annuities.[3]

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[3] The Comptroller determined that sales of fixed annuities were permissible whether or not such annuities were also "securities" for purposes of 12 U.S.C. 24 Seventh as amended

In evaluating NationsBank's application, the Comptroller explained that "[a]s part of their traditional role as financial intermediaries, banks have broad powers to buy and sell financial investment instruments as agent for customers." NBNC Pet. App. 38a. He noted that "[a]lthough annuities have historically been a product of insurance companies, they are primarily financial investments," because fixed annuity investors "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a guaranteed, long-term return on their assets." *Ibid.* The opinion acknowledged the element of "mortality risk" present in some annuities, but concluded (in accordance with a number of authorities) that it "is essentially an investment risk, not an insurance risk," and that "although annuities often share with insurance the need for actuarial calculations, they are primarily a vehicle for investment." *Id.* at 38a-39a. Finally, the Comptroller found a "close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent" (*id.* at 39a), including variable annuities, conventional debt instruments and certificates of deposit. *Id.* at 39a-41a. He therefore concluded that "fixed annuity contracts are financial investment instru-

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by Section 16 of the Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 184-185 ("The business of dealing in securities and stock by [a bank] shall be limited to purchasing and selling * * * without recourse, solely upon the order, and for the account of, customers[.]"). He therefore had no occasion to consider whether fixed annuities are "securities" for purposes of Section 24 Seventh, and this case does not present that issue. NBNC Pet. App. 37a-38a.

ments that national banks have authority to sell as agent." *Id.* at 41a.

The Comptroller also considered (NBNC Pet. App. 41a-47a) whether 12 U.S.C. 92, which permits national banks in towns of 5,000 or fewer inhabitants to "act as the agent for any fire, life or other insurance company * * * by soliciting and selling insurance and collecting premiums," by implication prohibits banks in other places from acting as a sales agent for annuities. He first noted OCC's general position that Section 92 was intended only to provide an additional source of revenue to national banks operating in small towns, and has no independent effect on the powers of banks operating elsewhere. NBNC Pet. App. 42a. After canvassing the available authorities (*id.* at 43a-47a), the Comptroller then concluded that, just as annuities are best characterized as investment products for purposes of Section 24 Seventh, so too they "lack the basic insurance characteristic of indemnification against risk of loss," and thus should not be considered "insurance" for purposes of Section 92. NBNC Pet. App. 47a.

Finally, the Comptroller pointed out (NBNC Pet. App. 42a-43a) that Section 92 speaks only of a bank's power to act as an agent for any "fire, life, or other general insurance company." Applying the principle of "ejusdem generis," he concluded that the statute should in all events be read to apply only to "types of insurance that are similar to fire and life insurance, such as other general casualty insurance policies." NBNC Pet. App. 43a. The Comptroller distinguished on that basis the Fifth Circuit's previous decision in *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010 (1968), which held that Section 92 prevented the Comptroller from allowing a bank not

located in a small town to sell borrowers "broad forms of automobile, home, casualty and liability insurance." 399 F.2d at 1012. The Comptroller determined that, even if annuities were to be considered "insurance" for purposes of Section 92, they would remain "a specialized product, unrelated to the general life and casualty policies that section 92 concerns." NBNC Pet. App. 43a. That Section would therefore have no application to annuities, which should be analyzed only to determine whether their sale was "incidental" to "the business of banking" under Section 24 Seventh. NBNC Pet. App. 43a.

3. Variable Annuity Life Insurance Co. (VALIC), an issuer of annuities, filed suit in federal district court to overturn the Comptroller's approval. After ruling (in an unreported order) that VALIC could properly bring suit in the Southern District of Texas to challenge the Comptroller's approval of annuity sales by a bank located in North Carolina, the district court granted summary judgment for the Comptroller. NBNC Pet. App. 29a-34a. Addressing primarily VALIC's argument under 12 U.S.C. 92, the court found it "neither arbitrary nor capricious" to view that Section "as a supplemental powers provision and not a limitation on national banks['] incidental powers under § 24(7)." NBNC Pet. App. 33a-34a. Moreover, applying the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court deferred to the Comptroller's "reasonable interpretation" that "annuities are primarily financial investment instruments, not insurance" for purposes of the relevant banking laws. NBNC Pet. App. 33a. Finally, the court upheld as reasonable the Comptroller's determination that "annuities are a specialized prod-

uct and not a 'broad form' of insurance" covered by Section 92 and the decision in *Saxon*. NBNC Pet. App. 34a.

4. The court of appeals reversed. NBNC Pet. App. 1a-17a. Relying in substantial part on its decision in *Saxon*, the court determined that 12 U.S.C. 92 imposes an affirmative limitation on the power of national banks not located in small towns to sell any form of "insurance." NBNC Pet. App. 6a-10a, 15a-17a. The court then rejected the Comptroller's conclusions that annuities are not "insurance" for purposes of Section 92 (NBNC Pet. App. 10a-13a) and that, in any event, the statute applies only to "broad" types of insurance akin to fire and life insurance (*id.* at 13a-14a).

The full court of appeals denied the Comptroller's and NationsBank's suggestions for rehearing en banc. NBNC Pet. App. 18a-19a. Of the thirteen active judges on the court, six recused themselves. *Id.* at 19a n.*, 20a. Because the Fifth Circuit counts disqualified judges in determining whether a majority of the court wishes to review a case en banc (see *id.* at 20a n.1), an order granting the suggestions would have required an unanimous vote of the remaining seven judges—including the two who sat on the panel that decided the case. Thus, although four judges—a majority of those not recused—voted to hear the case, the suggestions were denied. The four dissenters emphasized the importance of the case "to the banking industry and to commerce and competition in general." *Id.* at 21a. Leaving aside the issue of overruling *Saxon*, the dissenters concluded that, on the remaining question whether all annuities are forms of "insurance" for purposes of Section 92, "[t]he better view—and certainly a reasonable one that is

entitled to deference under *Chevron*—is that of the Comptroller." NBNC Pet. App. 23a-24a.

REASONS FOR GRANTING THE PETITION

1. The decision below rests on two conclusions: that fixed and variable annuities are forms of "insurance" for purposes of 12 U.S.C. 92, and that Section 92 prohibits banks located outside small towns from acting as sales agents for any "insurance" product, even if the Comptroller has determined that such sales are incidental to the business of banking within the meaning of 12 U.S.C. 24 Seventh. Both conclusions are erroneous. More important, in reaching neither did the court of appeals adequately justify its rejection of the Comptroller's contrary interpretations of the banking statutes that Congress has entrusted him to administer. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

a. The Comptroller's decision in this case determined (NBNC Pet. App. 43a-47a) that annuities are not "insurance" within the meaning of 12 U.S.C. 92, which provides that national banks doing business in small towns "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums on policies issued [.]" The statute itself neither defines the term "insurance" nor addresses the issue of annuities. As the district court recognized (NBNC Pet. App. 33a), under *Chevron* that interpretive gap in the banking laws is one for the Comptroller to fill, provided his interpretation is reasonable. 467 U.S. at 843; see also *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388,

403-404 (1987). The interpretation adopted by the Comp-troller in this case is reasonable, and it is entitled to deference.

First, as the Comptroller explained, "[d]ictionary definitions of 'insurance' invariably describe it as a contract for indemnification against risk of loss." NBNC Pet. App. 43a-44a (citing examples). Annuities, on the other hand, to a large extent "lack the basic insurance characteristic of indemnification against risk." *Id.* at 47a. Indeed, as the Comptroller observed, annuity purchasers generally "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a * * * long-term return on their assets."[4] *Id.* at 38a.

Second, the Comptroller marshalled considerable authority for the proposition that annuities are not treated as "insurance" in other contexts, including tax, bankruptcy, and insurance law.[5] NBNC Pet.

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[4] In this respect annuities bear some resemblance to "whole" (as opposed to term) life insurance, which also builds cash value over time. A whole life policy, however, in effect combines term life insurance and investment components. An annuity resembles only the investment component—a point consistent with the Comptroller's conclusion (NBNC Pet. App. 45a) that annuities are "primarily a vehicle for investment, not indemnification." Whole life insurance and annuities also both allow invested funds to compound on a federal income tax-deferred basis. The tax benefits accorded annuities do not, however, depend on assimilating them to insurance; annuities are treated as *sui generis* for federal tax purposes. See 26 U.S.C. 72.

[5] The Comptroller acknowledged (NBNC Pet. App. 46a) that cases construing the exemption for "[a]ny insurance or endowment policy or annuity contract or optional annuity contract" under Section 3(a)(8) of the Securities Act of 1933, 15 U.S.C. 77c(a)(8), "occasionally speak of fixed annuities as being

App. 44a-45a & nn.14-18. Indeed, as the New York Court of Appeals recently concluded in deferring to a state banking law interpretation based on the Comptroller's determination at issue in this case, "the great weight of authority supports the position that annuities are not insurance." *New York State Ass'n of Life Underwriters Inc.* v. *New York State Banking Dep't*, No. 38 (Mar. 30, 1994), slip op. 11. Accord, *e.g.*, 1 J. Appleman, *Insurance Law and Practice* § 84, at 295 (1981) ("Annuity contracts must * * * be recognized as investments rather than as insurance."). This Court itself has recognized that in terms of their risks and benefits, "annuity and insurance are opposites." *Helvering* v. *Le Gierse*, 312 U.S. 531, 541 (1941). Or, as one court aptly put it, "annuities are not indemnities for death but are investments for life." *Corporation Comm'n* v. *Equitable Life Assur. Soc'y.*, 239 P.2d 360, 362 (Ariz. 1951).

The court of appeals did not evaluate the reasonableness of the Comptroller's interpretation of the term "insurance" as used in Section 92, but rather approached the question de novo. Whether or not the court's conclusions could be viewed as reasonable, standing on their own, that approach to review of the Comptroller's decision was clearly erroneous. See, *e.g.*, *Chevron*, 467 U.S. at 843-845; *Clarke* v. *Securities Industry Ass'n*, 479 U.S. at 403-404. The court never addressed the Comptroller's fundamental point that annuities are primarily investment vehicles, not contracts of indemnification. Having failed to

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'insurance' rather than 'securities.'" As the Comptroller pointed out, however, those cases interpret a different statute with different purposes, and do not control the analysis in the context of the banking statutes.

impeach the reasonableness of the Comptroller's construction in light of the language and purposes of Section 92 and the remainder of the banking laws, the court erred in substituting its judgment for his on matters within the Comptroller's special expertise and regulatory competence.

b. The court of appeals also erred in refusing to defer to the Comptroller's conclusion that even if annuities were considered "insurance" for purposes of 12 U.S.C. 92, the statute should not be construed to prohibit banks outside small towns from selling them (as agents) once the Comptroller has concluded that such sales are incidental to the business of banking.

Section 92 provides that "*[i]n addition to* the powers now vested by law in national banking associations," national banks in small towns may "act as the agent for any fire, life or other insurance company" in selling insurance policies. (Emphasis added.) The introductory phrase "in addition to" shows that Section 92 is a grant of additional powers for a special situation.[6] It does not purport to define the scope of

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[6] The statute's legislative history also indicates that Congress thought of Section 92 as a grant of additional powers, not a limitation on otherwise authorized activities. Senator Owen, Section 92's sponsor, described the provision as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,002 (1916); see also *id.* at 11,001 (Comptroller's letter explaining that proposal reflected consideration of "how the powers of these small national banks might be enlarged"). See also *Independent Ins. Agents of Am., Inc.* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance."). The court of appeals also cited (NBNC Pet. App. 16a) documents written by the Comptroller and counsel to the Federal Reserve, prior to Sec-

the other lawful "powers" whose existence it assumes and supplements. Those powers, which pre-date and survive Section 92, include the general authority under Section 24 Seventh to "exercise * * * all such incidental powers as shall be necessary to carry on the business of banking." Even if annuities are "insurance," there is no reason why the Comptroller may not conclude that those incidental powers extend to acting as a sales agent for limited classes of such "insurance" products, whose essential investment character brings them within the ambit of banks' traditional investment agency activities on behalf of their customers.[7]

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tion 92's passage, to show that Congress believed national banks had no authority to act as insurance agents before Section 92 was enacted. See 53 Cong. Rec. 11,001 (1916) (letter from Comptroller Williams to Senator Owen); *Right of a National Bank To Write Insurance Through Its Officers*, 2 Fed. Res. Bull. 73, 74 (1916) (letter from Board Counsel Elliot to Board Governor Hamlin). Both documents refer to insurance in general terms. See 53 Cong. Rec. 11,001 (1916) (referring to "fire, life, etc." insurance); 2 Fed. Res. Bull. at 73 (analyzing the power of national banks to write "fire, cyclone, liability and other kinds of insurance"). Neither suggests that specific kinds of insurance agency activity that are closely connected to banking would not fall within the incidental powers of national banks.

[7] The court of appeals stated in passing (NBNC Pet. App. 14a-15a) that even if the sale of annuities were "incidental" to the "business of banking," it could not be authorized under 12 U.S.C. 24 Seventh because it is not "necessary to carry on" a banking business. Assuming that the court's observation should be viewed as an independent holding, it clearly embodies an unduly crabbed notion of the statutory term "necessary." See, *e.g.*, *M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978); *New York Ass'n of Life Underwriters*, slip op. 7-10

To be sure, Section 92 carries some negative implication; there would be little point in granting small-town banks the power to act as insurance agents if any bank could already do so under Section 24 Seventh. But the court of appeals swept too broadly in concluding that Section 92's reference to *some* forms of "insurance" necessarily implied that banks could have no power, independent of Section 92, to sell *any* kind of "insurance." Section 92 applies only to the activities of national banks acting as agents for any "fire, life or other insurance company." Under the interpretational principle of *ejusdem generis*, a general term in a statutory list should be understood in light of the specific terms that surround it. *E.g.*, *Hughey* v. *United States*, 495 U.S. 411, 419 (1990). Applying that principle, the Comptroller permissibly concluded that Section 92's grant of authority—and its concomitant implication that authority was otherwise lacking—should be construed to refer only to the unrestricted sale of fire, life, and other similar insurance, and not to the sale of investment-type "insurance" products the sale of which falls within the business of banking or is incidental thereto.[8]

(rejecting same argument under New York law on which federal law was modeled); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413-415 (1819); cf. *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 112 S. Ct. 1394, 1402 (1992).

[8] Indeed, application of *ejusdem generis* is necessary to give meaning to Congress's specification of "fire" and "life" insurance in Section 92. Under the court of appeals' reading of the statute, those terms are entirely unnecessary, since all types of insurance, including fire and life insurance, are encompassed in the phrase "any * * * insurance company."

The Comptroller's construction maintains an appropriate balance between Sections 24 Seventh and 92. The general grant of powers in Section 24 Seventh permits banks to engage only in activities (including insurance agency activities) that are "incidental" to the "business of banking." Section 92, by contrast, permits banks located in small towns to act as agents for the sale of the full range of insurance products, including those sold by "any fire, life or other insurance company," whether or not such sales are incidental to the business of banking. It is this additional authority—to engage in the sale of forms of insurance not otherwise within the business of banking or incidental thereto—that Section 92 gives to national banks in small towns. That grant does not negate the possibility that the sale of annuities, even if properly denominated as "insurance," might be sufficiently related to the business of banking to come within the existing incidental powers of national banks. And the question whether such products, or any others, *are* so related is one uniquely within the expertise and competence of the Comptroller, not the courts.[9]

[9] As explained above (see pages 5-6 & n.3, *supra*), the Comptroller's decision in this case focuses on fixed annuities, the sale of variable annuities having been approved some years before. The judicial opinions below in this case make no distinction between fixed and variable products in their analysis. In our view, the Comptroller's rationale for approving the sale of fixed annuities—that they are "financial investment interests" that banks may buy and sell on behalf of customers as part of their "traditional role as financial intermediaries" (NBNC Pet. App. 38a)—applies *a fortiori* to sales of variable annuities, which are even more clearly investment-oriented products. Alternatively, the Comptroller's prior decision in OCC Letter 331, which held that sales of variable annuities are

The question whether Section 92 prohibits national banks in large towns from acting as agents for any sort of "insurance" product has divided the courts of appeals. The court below in this case and the Second Circuit in *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150 (1992), cert. denied *sub nom. Ludwig* v. *American Land Title Ass'n*, 113 S. Ct. 2959 (1993), have held that Section 92 prohibits the sale of annuities and title insurance, respectively, despite explicit determinations by the Comptroller that agency sales of those products are incidental to the business of banking. By contrast, the D.C. Circuit in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1169-1170 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), rejected just such a reading of Section 92 and upheld the Comptroller's regulatory authority to permit the agency sale of so-called "credit life insurance" as incidental to the banking business.[10]

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permissible because such annuities are "securities" for purposes of 12 U.S.C. 24 Seventh's explicit provision addressing the permissible scope of banks' "business of dealing in securities," is incorporated by reference in the Comptroller's decision in this case. NBNC Pet. App. 35a, 37a-38a; OCC Letter 499. Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) (agency decision may be upheld only on grounds relied upon by agency). That prior decision is as reasonable and entitled to deference as the Comptroller's decision with respect to fixed annuities. Indeed, because a primary rationale for the prior decision was that variable annuities are primarily investment contracts (see OCC Letter 331, at 77,774, 77,776), there is little functional difference in the analysis for purposes of this case.

[10] The court below purported to distinguish *Heimann* by noting that credit life insurance "secures the repayment of the borrower's indebtedness, and thus is intimately related to the bank's primary business of lending." NBNC Pet. App. 14a. While certainly true, that statement is unfortunately irrelevant

See also *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (national bank subsidiary permitted to sell municipal bond "insurance" by analogy to established power to provide standby letters of credit); *Independent Ins. Agents of Am., Inc.* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) (permitting agency sales of insurance related to protecting security interest in financed property, and noting in dictum a "strong argument" that the Fifth Circuit's prior *Saxon* decision was "wrongly decided"); *New York State Ass'n of Life Underwriters Inc.* v. *New York State Banking Dep't*, *supra* (deferring to state regulator's decision permitting New York banks to act as agents for sales of annuities).

2. Although the issue of whether and to what extent Section 92 limits banks' ability to make agency sales that the Comptroller has otherwise determined to be incidental to their banking business under 12 U.S.C. 24 Seventh has produced conflict among the circuits, the Court denied our request to resolve that conflict last Term. *Ludwig* v. *American Land Title Ass'n*, 113 S. Ct. 2959 (1993). This case involves the additional issue whether annuities are "insurance" for purposes of Section 92. Nonetheless, we would not

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under the court's own holding. The court's conclusion that Section 92 bars banks from selling annuities rested not on a judgment that annuities are insufficiently related to the business of lending to come within a bank's incidental powers, but rather on a determination that they are contracts of "insurance," and *ipso facto* prohibited under Section 92 and impermissible under Section 24 Seventh. NBNC Pet. App. 13a-17a. While the characterization of annuities may be debatable, that of credit life insurance is not—it is indisputably "insurance." The court's observation therefore does nothing to lessen the conflict between its logic and the result in *Heimann*.

normally seek further review under these circumstances, even though we think the issues involved are of substantial legal and practical importance. Additional considerations peculiar to this case, however, persuade us that review is warranted here.

a. The decision below involves a particularly flagrant failure by the court of appeals to apply the well-settled principles of deference articulated by this Court in *Chevron* and applied specifically to the Comptroller in *Clarke* v. *Securities Industry Ass'n.* The district court properly applied those principles in evaluating the Comptroller's decision in this case. The court of appeals, by contrast, dismissed *Chevron* on the ground that the text and intent of 12 U.S.C. 92 were so clear as to preclude interpretation. NBNC Pet. App. 9a. The implausibility of that contention is apparent from the differing arguments mustered by the Comptroller's decision on the one hand and by the court's own opinion on the other. It is underscored by the dissent of four judges from the denial of rehearing en banc, on the explicit ground that the Comptroller's position on the meaning of "insurance" for purposes of Section 92 represents "[t]he better view—and certainly a reasonable one that is entitled to deference under *Chevron*" (NBNC Pet. App. 24a), and by the conflict among the courts of appeals on the larger issue of Section 92's function and its relationship to Section 24 Seventh.

The regulation of banking is an area of great importance, requiring a combination of special functional expertise and informed choices among sometimes conflicting goals. Those goals include both the maintenance of a strong banking industry in light of modern developments in investment and finance and the protection of banks and bank customers from the

expansion of bank activities into inappropriate areas. It would be difficult to identify a regulatory context in which it is clearer that courts should defer, in matters of statutory interpretation, to "reasonable accommodation[s] of conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). In this case the interpretations adopted by the Comptroller were thoroughly discussed and well supported in his decision. The court of appeals' failure to defer to those interpretations represents a clear and important error.

b. The opportunity for rehearing and correction by the full court often suffices to protect against a panel's failure to apply well-settled principles correctly in the context of a particular case. In this case a majority of the active judges voting on the issue—including four of the five who did not serve on the original panel[11]—favored granting rehearing en banc. NBNC Pet. App. 20a. Because six active judges recused themselves, however, the grant of rehearing would have required the concurrence of *all* non-recused active judges, including the original panel members. As the dissenters from the denial of rehearing en banc pointed out, the Comptroller was therefore precluded from "discern[ing] the views of a substantial majority of the active judges" on the court of appeals. *Ibid.* Moreover, as the dissenters pointed out, "[r]ecusal seems to be a particular problem in cases involving large banks and their

[11] The original panel included judges Jolly and Wiener and Senior Judge Goldberg, who was not entitled to vote on the suggestion for rehearing en banc. See Fed. R. App. P. 35(a).

regulatory agencies (and the attorneys of both) with whom several active judges are likely to have relationships that require them to recuse." *Id.* at 21a. For that reason (and because it is impossible to determine why particular judges recused themselves in this case), it is possible that the same problem would recur were further cases raising the same issues brought before the Fifth Circuit.

c. Moreover, it is possible that neither the government nor affected banks will have the opportunity to litigate the issues involved in this case further in other circuits. Respondent VALIC, which is headquartered in Houston, underwrites and sells fixed and variable annuities in all 50 States. NBNC Pet. App. 4a. Assuming that venue was proper in this case (where the bank involved is not located in the Fifth Circuit and sold no annuities there), VALIC is therefore in a position to challenge in the courts of the Fifth Circuit any future decision by the Comptroller to approve a bank's application to sell annuities.[12] Thus, it is possible that the decision

[12] A national bank might choose to proceed with sales that it believed to be within its authority, without seeking explicit approval from the Comptroller. We are informed, however, that for a variety of legal and business reasons, agency sales of annuities are almost invariably conducted through brokerage subsidiaries, rather than directly by the parent banks. Sales by such subsidiaries are subject to mandatory prior legal and policy review by the Comptroller. 12 C.F.R. 5.34. We are also informed that national banks of significant size would typically have sufficient business contacts with one or more States in the Fifth Circuit to render them amenable to suit there. It thus appears likely that any suit VALIC might be able to bring directly against such a bank, to challenge its sales of annuities in alleged violation of federal law, could also be brought in the Fifth Circuit.

below will effectively preclude national banks from selling annuities of any type—and perhaps a wide variety of other products that are or may be thought of as "insurance"—anywhere in the country (other, presumably, than in small towns covered by Section 92), despite the Comptroller's conclusion that they have the power to do so. The Second Circuit's decision in *American Land Title* presented no similar risk that it would preclude further litigation in other circuits.

d. The issue of Section 92's scope and effect is inextricably intertwined with the additional issue present in this case: whether the annuities at issue here constitute "insurance" for purposes of that Section. In addition, the ability to sell annuities is of far greater importance to national banks—and therefore to their federal regulators—than the ability to sell title insurance of the sort involved in *American Land Title*. The dissent from denial of rehearing en banc in this case notes (NBNC Pet. App. 21a-22a) that in 1992 banks sold some $12.2 billion of fixed and variable annuities, representing approximately 17% of all individual annuities and 21.9% of fixed annuities sold nationwide, and accounting for some 7% of all bank brokerage sales.[13] We are informed that the volume of bank annuity business increased substantially in 1993.[14]

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[13] We are advised that annuities are valued for these purposes on the basis of the gross premium required to be paid by the purchaser over the life of the contract.

[14] In light of the substantial growth in annuity sales through banks, the federal bank regulatory agencies (including OCC) recently proposed to require all banks under their jurisdiction to report such sales (together with sales of mutual fund shares)

e. Finally, the conflict described in the *American Land Title* petition has now deepened. The court of appeals in this case cited and relied on *American Land Title* and rejected (while purporting to distinguish) the D.C. Circuit's contrary decision in *Heimann*. NBNC Pet. App. 6a-7a, 13a-14a, 16a. Furthermore, as discussed above, the New York Court of Appeals has recently upheld a state regulatory decision—prompted by and premised in large part on the Comptroller's decision in this case—that New York banks should be permitted to make agency sales of annuity products. *New York State Ass'n of Life Underwriters*, slip op. 2-3, 11-14. While the New York court's decision is based on state law and thus presents no direct legal conflict with the decision below (see *id.* at 13), it is nonetheless relevant in two respects. First, the court's appropriate deference under state law principles to a determination by state banking regulators that was explicitly based on "reasons similar to those stated in OCC Letter 499" (*ibid.*) provides a sharp contrast to the court of appeals' refusal in this case to defer, under *Chevron*, to the Comptroller's decision contained in that letter itself.[15] Second, the existence of approval for sales of annuities by New York banks

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in their quarterly Reports of Condition and Income. See 59 Fed. Reg. 2603-2604 (1994).

[15] The similarity of the issues before the New York court and the issues in this case is further emphasized by the fact that 12 U.S.C. 24 Seventh, the basic federal bank powers statute at issue here, was originally modeled on the parallel provision of New York law at issue in *New York State Ass'n of Life Underwriters*. See, *e.g.*, Trimble, *The Implied Power of National Banks To Issue Letters of Credit and Accept Bills*, 58 Yale L.J. 713, 719 (1949).

raises the undesirable prospect of important differences in bank powers that arise from the difference between state and federal regulation, and yet have been judicially placed beyond the power of federal regulators to correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1994

(3) (3)

Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EUGENE LUDWIG,
COMPTROLLER OF THE CURRENCY, ET AL.,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the *Chevron* standard when it did not adopt the Comptroller's new construction of 12 U.S.C. § 24(7) or his new determination that annuities do not constitute "insurance" for purposes of 12 U.S.C. § 92, even though the Comptroller contradicted his prior construction of those statutes. (No. 93-1612)

2. Whether 12 U.S.C. § 92, which provides that, "in addition to" their other powers, national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company," impliedly bars national banks in more populous places from brokering annuities. (No. 93-1612)

3. Whether the federal law permits national banks wherever located, to act as agents in the sale of annuities. (No. 93-1613)

4. Whether the sale of annuity contracts is "necessary to carry on the business of banking" under 12 U.S.C. § 24(7).

DISCLOSURE OF CORPORATE PARENT

American General Corporation is the parent corporation of respondent, Variable Annuity Life Insurance Company.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

SUMMARY

This Court should not review the decision below, which was a correct and unremarkable interpretation of 12 U.S.C. §§ 92 and 24(7). The Fifth Circuit's decision is consistent with *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied sub nom., Ludwig v. American Land Title Ass'n*, 113 S. Ct. 2959 (1993), and is no more worthy of review than that case was a year ago. This case presents no conflict among the lower courts, and petitioners' suggestions of grave peril to the banking industry are greatly exaggerated.

COUNTER-STATEMENT OF THE CASE

A. 1916: Congress Allows Small-Town National Banks To Act As Agent For Insurance Companies

In 1916, at the request of then-Comptroller of the Currency John Skelton Williams, Congress enacted 12 U.S.C. § 92 ("section 92"), which provides that national banks (emphasis added):

> located and doing business in any place the population of which does not exceed five thousand inhabitants ... [may] *act as the agent for any fire, life, or other insurance company* authorized by the authorities of the State in which such bank is located to do business in such State, by soliciting and selling insurance and collecting premiums on policies issued by such company . . . .

In a letter to Congress proposing this provision, Comptroller Williams observed that under existing law, "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." 53 Cong. Rec. 11001 (July 14, 1916). Four months earlier, the Federal Reserve Board also had concluded that national banks had no authority to engage in insurance agency activities. 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916).

Judging that "small national banks" would benefit from additional sources of revenue, Comptroller Williams asked Congress to grant "limited" authority to national banks located in small "villages and towns" "to act as agents for insurance companies in the placing of policies of insurance." 53 Cong. Rec. 11001. He sought congressional action because "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." *Id.*

Wary of allowing banks "to trespass upon outside business naturally belonging to others," Comptroller Williams also ex-

plained that the small amount of business generated by this new insurance power would "not [be] likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.* Indeed, Comptroller Williams pointedly advised Congress that "it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers." *Id.*

B. 1968: The Fifth Circuit Holds That Section 92 Bars National Banks From Acting As Agents For Insurance Companies In Towns With Population Over 5,000

Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1012-1013 (5th Cir. 1968), construed section 92 to "prohibit national banks from carrying on the business of insurance agents in places of more than 5,000 population." Applying the principle of *expressio unius est exclusio alterius*,[1] *Saxon* reasoned that by conferring limited insurance agency powers upon small town national banks, Congress "clear[ly]" intended to deny "any other power" for national banks to act as insurance agents. *Id.*, at 1014, 1016. Noting the legislative genesis of section 92, *Saxon* further explained that prior to its enactment, it was "universally understood that no national banks possessed *any* power to act as insurance agents." *Id.*, at 1013 (emphasis in original). *Saxon* therefore rejected the assertion that national banks could act as insurance agents under 12 U.S.C. § 24(7), which grants banks "all such incidental powers as shall be necessary to carry on the business of banking."

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[1] "The expression of one thing is the exclusion of another."

C. 1978: The Comptroller Rules That Section 92 Bars The Sale Of Annuity Contracts By Large-Town National Banks

In an opinion letter dated June 16, 1978, the Comptroller ruled that a national bank's proposal to broker annuity contracts as agent for an insurance company "would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. § 92." R. 7-8.[2] The Comptroller rejected an attempt by that bank to evade section 92 by characterizing its role as "fiduciary." The Comptroller observed that "in reality" "the bank is receiving [a fee] for the sale of insurance." *Id.*

A few years later, the Comptroller similarly ruled that section 92 would prohibit a national bank from acting as agent in the sale of life insurance. OCC Interpretive Letter No. 241, *reprinted in* Whiting, *A Guide to the Federal Law of Banking and Insurance* (1991), p. 328 (Mar. 26, 1982) ("OCC Ltr. 241"). The Comptroller explained:

> it is highly unlikely that a court would consider the activities of a national bank which acted as an agent in the sale of life insurance as incidental to the business of banking under 12 U.S.C. 24(7).

D. 1990: The Comptroller Reverses Himself On the Sale Of Annuity Contracts By National Banks

In 1989, NationsBank (then NCNB) sought permission from the Comptroller to sell annuity contracts through a subsidiary. R. 57-59. According to NationsBank, the new activities would involve "the offering and sale, on an agency basis, of various annuity contracts . . . offered by a number of insurance companies." R. 11-12. NationsBank explained that purchasers could choose from annuity contracts having fixed annuity fea-

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[2] References to "R. ___" herein are page references to the record on appeal to the court of appeals. The text of the June 16, 1978 letter is reproduced at Appendix A, *infra*.

tures, variable annuity features, or a combination of fixed and variable features. R. 13.

By letter dated March 21, 1990 (the "Approval"), the Comptroller approved the proposal. The Approval conceded that "annuities have historically been a product of insurance companies" and that "annuities often share with insurance the need for actuarial calculations" of "mortality risk." NationsBank Pet. App. 38a-39a. To avoid the statutory limits on the insurance activities of national banks, however, the Comptroller renamed fixed annuity contracts, calling them "financial investment instruments." He then decreed that national banks have the inherent power to "broker a wide variety of financial investment instruments." *Id.*, at 38a. The Comptroller added that fixed annuity contracts are "similar to" variable annuity contracts, which he previously had allowed national banks to broker. *Id.*, at 39a; OCC Interpretive Letter No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 at 77,773-77 (Apr. 4, 1985) ("OCC Ltr. 331").

The Approval disagreed with *Saxon*'s holding that the limited "insurance agency power in Section 92 . . . negates the existence of any other power to act as an insurance agent." 399 F.2d at 1014; NationsBank Pet. App. 42a. The Approval also expressed "doubt[] that the word 'insurance' in section 92 can be construed to include annuities." *Id.*, at 43a. The Approval never mentioned the Comptroller's 1978 conclusion that section 92 bars national banks from selling annuity contracts, except in small towns.

E. Proceedings Below

VALIC brought suit challenging the Approval as contrary to statute. The district court denied VALIC's motion for summary judgment and granted petitioners' cross-motions for summary judgment. *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991) (NationsBank Pet. App. 29a-34a). The court of appeals reversed. *Variable Annuity Life Ins. Co. v.*

Clarke, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994) (NationsBank Pet. App. 1a-28a).

Finding that the language and legislative genesis of section 92 plainly establish Congress' meaning, the court of appeals reaffirmed *Saxon*'s central holding that "under § 92 'national banks have no power to act as insurance agents in cities of over 5,000 population.'" NationsBank Pet. App. 6a, 10a. In reaching that conclusion, the court noted that deference to an administrative interpretation is not appropriate under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when the intent of Congress is clear. NationsBank Pet. App. 9a (*citing Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992)).

The court drew further support from the 1992 ruling in *American Land Title Ass'n v. Clarke*, *supra*, which reversed a decision by the Comptroller that allowed national banks to act as agents for title insurance companies. The court of appeals emphasized that *American Land Title*, like *Saxon* (NationsBank Pet. App. 7a),

> cogently deduced that 'had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants.'

The court of appeals also disagreed with the Comptroller's alternative contention that section 92 does not apply because "annuities are not insurance." NationsBank Pet. App. 10a. The court observed that the Comptroller had conceded that "annuities have historically been a product of insurance companies" and that annuity contracts are based on "actuarial calculations" of mortality risk. *Id.*, at 10a, 13a n.4. Indeed, the court reported that "[a]ll fifty states currently regulate annuities under their insurance laws." *Id.*, at 11a. Explaining that many annuity

contracts transfer and distribute mortality risk, the court concluded that annuity contracts are "insurance in the true sense of the term." *Id.*, at 12a, n.3.

Finally, the court of appeals rejected the Comptroller's assertions that section 92 does not apply to "specialized" insurance products like annuity contracts and that the selling of annuity contracts is an "incidental power" granted to national banks under 12 U.S.C. § 24(7). Stressing section 92's bar against large-town national banks serving as agents for "any . . . insurance company," the court refused to engage in the "arbitrary exercise of examining whether a particular type of insurance product conforms to a platonic form of 'general' insurance." NationsBank Pet. App. 13a (*quoting American Land Title*, 968 F.2d at 156), 14a. The court of appeals also observed that the sale of annuity contracts is by no means "necessary to carry on the business of banking" under § 24(7), and even if it were necessary, the specific terms of section 92 would control over that more general statute. *Id.*, at 15a (*citing American Land Title*, 968 F.2d at 157).

The full court of appeals denied the petition for rehearing en banc, with four judges dissenting. NationsBank Pet. App. 19a. Six judges were recused, while one member of the panel was a senior judge and did not participate in the en banc process.

REASONS FOR DENYING THE WRIT

Petitioners offer two reasons why this Court should grant the petition. First, the government contends the court of appeals erred because it did not "adequately justify" its rejection of the Comptroller's interpretation of section 92 under *Chevron*. Gov't Pet. at 11; *accord* NationsBank Pet. at 10, 14. Second, the government asserts that the issue whether "Section 92 limits banks' ability to make agency sales" has "produced a conflict among the circuits." Gov't Pet. at 19; *accord* NationsBank Pet.

at 22. Neither contention is correct, or warrants review by this Court.

Moreover, petitioners totally ignore the Fifth Circuit's holding that the sale of annuity contracts is beyond a bank's powers under § 24(7); that holding provides a fully adequate basis for sustaining the ruling below that would pretermit consideration of the questions petitioners argue to this Court.

I. THE COURT OF APPEALS CORRECTLY INTERPRETED SECTION 92

Petitioners' principal claim is that the court of appeals erred. This Court reviews for error only in cases of exceptional importance. S. Ct. Rule 10.1; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). The unremarkable statutory interpretation in this case presents neither error nor any issue of exceptional importance.

A. The Court of Appeals Correctly Construed The Banking Statutes

Petitioners challenge three factors in the court of appeals' interpretation of section 92, arguing (i) that section 92 grants additional bank insurance powers without imposing any limitation upon those powers, (ii) that section 92 applies only to so-called "broad forms" and not to so-called "specialized forms" of insurance like annuity contracts, and (iii) that annuity contracts are not "insurance" under section 92. These claims are without force.

First, the court of appeals properly held that the affirmative grant of insurance powers to small town banks necessarily included a denial of such powers to banks in more populous areas. NationsBank Pet. App. 6a, 10a. *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"). Quoting from *American Land Title*, the court reasoned (NationsBank Pet. App. 7a):

had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants.

The court of appeals also properly emphasized the genesis of section 92, which was enacted in response to Comptroller Williams' recommendation in 1916. Comptroller Williams noted that national banks had no powers to act as insurance agents and recommended that such powers "should be limited to banks in small communities." *Id.* (*quoting* 53 Cong. Rec. 11001 (1916)). Indeed, the government concedes that "Section 92 carries some negative implication" and that "there would be little point in granting small-town banks the power to act as insurance agents if any bank could already do so . . . ." Gov't Pet. at 16.

Second, the court of appeals joined the Second Circuit in rejecting the Comptroller's claim that section 92 applies only to "general" types of insurance. NationsBank Pet. App. 13a-14a. That contention fundamentally misreads the phrase "fire, life, or other insurance company" in section 92. The words "fire, life or other" modify the term "*insurance company*," not the word "*insurance*." Petitioners have long conceded that NationsBank is selling annuity contracts as agent for "life insurance" companies. R. 53-55.[3] NationsBank's activities thus are covered by the statutory phrase "fire, *life* or other insurance company."

Third, petitioners claim that annuity contracts are not "insurance." This claim is belied by the Approval's concession that "annuities have historically been a product of insurance companies" and include mortality factors and actuarial projections. NationsBank Pet. App. 10a, 13a n.4. The government also

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[3] Indeed, respondent, which specializes in annuity products, is named the Variable Annuity *Life Insurance* Co.

acknowledges that annuity contracts "share with insurance the need for actuarial calculations" and that the element of "mortality risk" is present in many annuity contracts. Gov't Pet. at 7.[4] Moreover, all fifty states regulate annuity contracts under their insurance laws. NationsBank Pet. App. 11a (collecting authorities). The unanimous view of state legislatures that annuity contracts are an insurance product is entitled to considerable weight. *See Mu'Min v. Virginia*, 111 S. Ct. 1899, 1905 (1991) (noting that prior decision "relied heavily on a unanimous body of state court precedents").

Other federal laws also "reflect the fact that annuities are an insurance product." NationsBank Pet. App. 11a (*citing* 26 U.S.C. § 816(a)). *Accord* 26 U.S.C. § 408(b) ("individual retirement annuity" defined as "an annuity contract . . . issued by an insurance company"); 26 U.S.C. § 501 ("[f]or purposes of this subsection, the issuance of annuity contracts shall be treated as providing insurance"); 26 U.S.C. § 814(b) ("insurance contract" defined to include "annuity contract"). The government attempts to minimize these authorities by asserting that "annuities are treated *sui generis* for tax purposes," Gov't Pet. at 12, n.4, but non-tax statutes also treat annuity contracts as insurance. *See, e.g.*, 10 U.S.C. § 7082 (requiring Navy civilian

[4] The court of appeals concluded that because annuity contracts both transfer and distribute the actuarially-derived risk of outliving one's resources, annuity contracts meet the functional test of insurance. NationsBank Pet. App. 12a; *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) ("[i]nsurance is an arrangement for transferring and distributing risk") (*quoting* R. Keeton, *Insurance Law* § 1.2(a) (1971)). Annuity contracts (which insure against outliving one's resources) may be called the "inverse" or "mirror image" of life insurance, which insures against the economic risk of dying prematurely. That does not establish, as petitioners contend, that annuity contracts are not insurance, but only that annuity contracts and life insurance are different insurance products. As one insurance authority writes, life insurance and annuities "are both insurance in the true sense of the term." NationsBank Pet. App. 12a, quoting S. Huebner and K. Black, *Life Insurance*, at p. 105 (6th ed. 1964).

employees to carry annuity policy in "life insurance corporation").

Indeed, the Bank Holding Company Act ("BHC Act") reflects Congress' view that annuity contracts are insurance. The BHC Act provides that, subject to exceptions not relevant here, bank holding companies may not provide insurance as principal, agent or broker because such activity "is not closely related to banking." 12 U.S.C. § 1843(c)(8) (reproduced in Appendix B, *infra*). A further proviso in the BHC Act also bars certain bank holding companies from selling "life insurance or *annuities* except as provided in subparagraph (A), (B), or (C)." *Id.* (emphasis added). Significantly, subparagraph (C) tracks the language of section 92, and permits bank holding companies to conduct (*id.*):

> any insurance agency activity [including the sale of annuities, as provided in the proviso] in a place that (i) has a population not exceeding five thousand . . . .

Thus Congress specifically equated annuities with insurance in a statute that tracks the language of section 92. Annuity contracts plainly are insurance under section 92.[5]

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[5] In an argument that the Comptroller does not join, the NationsBank petitioners claim that the court of appeals' decision violates this Court's decision in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959). But that decision held only that variable annuity contracts are not exempt from securities registration because the return to the annuitant is, by definition, variable. The Court explained that because variable annuity contracts include some investment risk for the purchaser (though the insurance company assumes a mortality risk), they are covered by the pro-disclosure policies of the Securities Act of 1933. *Id.*, at 77 (Brennan, J., concurring). Nothing in that opinion draws into question the court of appeals' conclusion that *fixed* annuity contracts are insurance under section 92. Although the petitions here ambiguously lump together both variable annuity contracts and fixed annuity contracts, Gov't Pet. at 17 n.9, *SEC v. VALIC* addressed only variable annuity contracts. Indeed, the reasoning in *SEC v. VALIC* supports the court of appeals' decision that fixed annuity contracts are an insurance product. 359

B. The Court Of Appeals Properly Applied *Chevron*

Petitioners challenge the court of appeals' supposed failure to pay sufficient homage to the Comptroller's interpretation of section 92. Gov't Pet. at 21; NationsBank Pet. at 14. Petitioners do not complain that the court of appeals ignored *Chevron*, nor do they allege that it rejected or modified *Chevron*'s two-step analysis. Rather, petitioners claim that the court of appeals wrongly determined that deference was not appropriate because the intent of Congress in section 92 is clear. This supposed error does not warrant review by this Court, whose resources would be sorely tried if it had to rectify every allegedly incorrect application of *Chevron*. This Court has denied certiorari in two dozen cases in the past five years that raised *Chevron* issues. See Appendix C, *infra*.

Review by this Court also is unwarranted because the court of appeals properly stated, understood, and applied *Chevron*. Finding the language and legislative genesis of section 92 to unambiguously bar NationsBank's proposal, the court reaffirmed *Saxon*'s holding that "under § 92 'national banks have no power to act as insurance agents in cities of over 5,000 population.'" NationsBank Pet. App. 6a. The court noted that deference is not appropriate under *Chevron* when the intent of Congress is so clear. *Id.*, at 9a. Moreover, since the Approval reversed the Comptroller's previous interpretation of section 92 in 1978 and 1982, *see* pp. 4-5, *supra*, the Approval is not entitled to significant deference under *Chevron*. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988).

U.S. at 71. *See also SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 206 (1967) ("provisions dealing with the operation of the fixed-payment annuity were purely conventional insurance provisions"). Moreover, variable annuity products are still regulated as insurance in all 50 states.

This Court recently warned that the principle of deference "has its limits" and emphasized that "[d]eference does not mean acquiescence." *Presley*, 112 S. Ct. at 831. Several factors support the court of appeals' conclusion that annuity contracts are insurance: (i) all fifty states regulate annuity contracts as insurance; (ii) numerous federal statutes (including the Bank Holding Company Act) treat annuity contracts as insurance; (iii) the Comptroller himself recognized annuity contracts to be insurance as recently as 1978; and (iv) the Comptroller concedes that "annuities have historically been a product of insurance companies" and often involve an "element of mortality risk." Deference would not be appropriate here.

The government contends that the court of appeals' failure to accept the Comptroller's new view of section 92 is a "particularly flagrant" failure to follow *Chevron*. But the Fifth Circuit's holding on section 92 simply followed the Second Circuit's decision in *American Land Title*, which also reversed a ruling by the Comptroller and which this Court declined to review. *See* Petition for Certiorari, *Steinbrink v. American Land Title Ass'n*, No. 92-645, at i (question presented is whether section 92 "impliedly bar[s]" large-town banks "from selling forms of insurance..., that the Comptroller of the Currency has determined are 'incidental' to the 'business of banking' under 12 U.S.C. 24 seventh").

Finally, petitioners ask this Court to turn *Chevron* on its head. The government complains that, following the Fifth Circuit's ruling, the statutory bar against national banks selling annuity contracts is "beyond the power of federal regulators to correct." Gov't Pet. at 25. Exactly. Congress clearly decided that national banks in large towns may not act as agents for life insurance companies, which includes the sale of annuity contracts. That statutory requirement is indeed "beyond the power of federal regulators to correct." *See Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992) ("[o]nce we have determined a

statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning"). If Congress has adopted bad policy, the petitioners, as the Fifth Circuit advised, "'should look to Congress, not the Comptroller' . . . . or the courts" for relief. NationsBank Pet. App. 17a.[6]

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS

Petitioners assert that this case presents a "classic" conflict among the circuits over the extent to which section 92 limits national banks' power to sell insurance. Gov't Pet. at 19; NationsBank Pet. at 22. Petitioners claim that even though this case agrees with the Second Circuit decision in *American Land Title*, it supposedly conflicts with the D.C. Circuit's decision in *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). There is no conflict. In fact, the *Heimann* court specifically found that its ruling did not conflict with *Saxon*, the precedent that controlled this case.

Heimann held that national banks have the incidental authority under 12 U.S.C. § 24(7) to sell credit life insurance to their borrowers. That is, in exchange for a fee, the borrower's debt will be satisfied if he dies before the loan is repaid. As the Fifth Circuit found, and as the Comptroller's Approval concedes, *Heimann* discusses section 92 only in dicta. NationsBank

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[6] The central holding below was first announced by the Fifth Circuit in *Saxon* more than 25 years ago. Congress has had ample opportunity to repair any error in that interpretation of section 92, but has not done so. To the contrary, in amending the Bank Holding Company Act in 1982, Congress *extended* to bank holding companies the prohibition on the sale of insurance by national banks. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, §§ 118(a), 601 (1982) (sale of insurance "is not closely related to banking").

Pet. App., 42a. *Heimann* concluded that section 92 does not bar credit life insurance, which is "a limited special type of coverage written to protect loans," a core banking function. 613 F.2d at 1170. Credit life insurance is designed primarily to protect the assets of the bank, and only secondarily to aid the borrower. Implicitly, *Heimann* concluded that credit life insurance is more a banking product than it is insurance. In contrast, annuity contracts are not tied to any banking operation.

Heimann stressed that because credit life insurance is so closely tied to banking functions, its ruling did not conflict with *Saxon*, which concerned insurance products unrelated to banking. *Id.* By the same reasoning, *Heimann* does not conflict with the Fifth Circuit ruling here, which concerns an insurance product totally unrelated to any banking function.

The government concedes that this Court declined to review this supposed conflict when it denied certiorari in *American Land Title*, and adds that it would not "normally seek further review." Gov't Pet. at 19-20. The government offers several reasons why review nevertheless is appropriate; none is persuasive.

The government states that this case involves a "particularly flagrant failure" to apply *Chevron*. As we have noted, that argument is contradicted by this Court's refusal to review *American Land Title*. *See* p. 13, *supra*.

Second, the Comptroller suggests that reversal of the court of appeals' ruling is necessary to "maintenance of a strong banking industry." Gov't Pet. at 20. Unless reversed, the Comptroller frets, that ruling may imperil a profitable product line for national banks (*id.*, at 23).

Petitioners contradict their own suggestion. The Comptroller acknowledges that banks sold $12.2 billion of annuity contracts in 1992, Gov't Pet. at 23, but never discloses that most of those sales will be totally unaffected by the outcome of this

case. Most of those sales are conducted through state-chartered banks, bank subsidiaries, or third-party arrangements with national banks. *See* Gov't Pet. at 22 n.12 (bank annuity contract sales "are almost invariably conducted through brokerage subsidiaries").

For example, nothing in the decision below affects "commonplace lobby lease and similar license arrangements used by many vendors to sell annuities . . . through banks." David W. Roderer, "Congress Should Defer Action on Bank Annuity Sales," *American Banker*, (Nov. 3, 1993), p. 12. Typically, licensed insurance agencies rent space in the national bank's lobby, placing their own employees or bank employees on the premises to sell annuity contracts to the bank's customers. Payments to the national bank are based on the gross commissions earned. Alternatively, a recent decision would permit even big-city national banks to broker insurance nationwide, so long as they conduct those sales from small town branches. *See Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). National banks, therefore, have several methods for offering annuity contracts to their customers — and for earning revenues from those sales — despite the court of appeals' ruling.

The government also complains that it may not be able to relitigate this legal question in other courts. It is "possible," according to the government, that judicial recusals will leave the panel opinion intact in the Fifth Circuit, and that VALIC may be able to challenge in the Fifth Circuit all national bank annuity activities. Gov't Pet. at 22. Such speculations provide no basis for granting certiorari. If those "possibilities" occur, and if they then loom large for this Court, there will be ample time to address them.

Finally, petitioners point to a recent decision by the New York Court of Appeals that annuities are not insurance under that state's banking law, arguing that it "will generate substantial

confusion and uncertainty." NationsBank Pet. at 19-20. The New York case, however, did not construe the powers of national banks; nor did it interpret section 92 or any state statute resembling section 92, as the New York court acknowledged. *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353 (1994). Accordingly, there is no conflict between that case and the judgment below.

III. THE SALE OF ANNUITY CONTRACTS IS NOT "NECESSARY TO CARRY ON THE BUSINESS OF BANKING"

Petitioners ignore entirely the further holding of the court of appeals that, if sustained by this Court, would prevent this Court from reaching the questions petitioners now raise. The court of appeals held that, regardless of the meaning of section 92, the selling of annuity contracts is not within the powers of a national bank under § 24(7), which grants only "such incidental powers as shall be *necessary* to carry on the business of banking." NationsBank Pet. App. 15a. (Emphasis added.) The Fifth Circuit held (*id.*):

> The Comptroller argues that the selling of annuities is an "incidental power" granted to national banks under § 24(7). The Comptroller's argument ignores the rest of [the statutory provision], i.e., "necessary to carry on the business of banking." Even conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed "necessary."

Because the sale of annuity contracts is not "necessary to carry on the business of banking" under § 24(7), this Court would have no occasion to reach the questions presented in the Petitions.

CONCLUSION

For all of the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX A

June 16, 1978

Dear Mr.

This is in response to your letter of March 21, 1978, to the Regional Administrator's Office in Denver, Colorado. You state that the bank would purchase a group annuity policy from an insurer and then sell annuity contracts as investments in trust accounts. The insurer would pay a fee to the bank for these contracts. You wish to know whether this activity would render the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. §92. You also ask whether the contracting by your bank with a single insurer in and of itself would call into question the prudence of the annuity investments or the arm's-length nature of the bank's dealings with the insurer.

It is my opinion that an arrangement of the kind that you describe would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. §92. You also ask whether the contracting by your bank with a single insurer in and of itself would call into question the prudence of the annuity investments or the arm's-length nature of the bank's dealings with the insurer.

It is my opinion that an arrangement of the kind that you describe would constitute the bank a seller or broker of insurance within the meaning of 12 U.S.C. §92. Although you indicate that the bank would perform various duties for this fee and although you state that this fee is a fiduciary fee which is more convenient for the insurance company to pay, the fee is in reality a fee that the bank is receiving for the sale of insurance. The duties that the bank would perform in connection with this service are not such as to take it out of the category of a broker or seller of insurance, particularly where the bank has a financial interest in the amount of insurance sold.

Furthermore, it is my opinion that contracting with a single insurer in and of itself may call into question the prudence of the annuity investments and the arm's-length nature of the bank's dealings with the insurer. On its face it appears that this arrangement is a business deal whereby the bank would be compensated for representing the insurance company and encouraging the sale of a product that the insurance company has to offer. The only purchasers of this service are trust accounts under the bank's administration. The bank, having a specific pecuniary interest in this arrangement, might not be in a position to render the highest investment advice in administering these trust accounts. The bank might be viewed more as a fiduciary and administrator of trust account and less as a broker or seller of insurance if it did not have such a group contract in existence, and if it were in a position of recommending individual annuity contracts only in certain instances and where its own pecuniary interest would not be as great or directly connected.

In addition, in any arrangements of the kind proposed in your letter, the bank should be careful to abide by the provisions of Section 9.12 of the *Comptroller's Manual for National Banks* (12 C.F.R. 9.12) including in particular those contained in subsection (a) thereof.

I trust this is responsive to your inquiry and will enable you to take such action as you deem appropriate.

Very truly yours,

/s/
Charles F. Byrd
Assistant Director
Legal Advisory Services Division

APPENDIX B

12 U.S.C. § 1843(c) provides (emphasis added):

(c) The prohibitions in this section shall not apply to ...

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, but for purposes of this subsection it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal, agent, or broker except (A) where the insurance is limited to assuring repayment of the outstanding balance due on a specific extension of credit by a bank holding company or its subsidiary in the event of the death, disability, or involuntary unemployment of the debtor; (B) in the case of a finance company which is a subsidiary of a bank holding company, where the insurance is also limited to assuring repayment of the outstanding balance on an extension of credit in the event of loss or damage to any property used as collateral on such extension of credit and, during the period beginning October 15, 1982, and ending on December 31, 1982, such extension of credit is not more than \$10,000 (\$25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) and for any given year after 1982, such extension of credit is not more than an amount equal to \$10,000 (\$25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) increased by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published monthly by the Bureau of Labor Statistics for the period beginning on January 1, 1982, and ending on December 31 of the year preceding the year in which such extension of credit is made; (C) any

insurance agency activity in a place that (i) has a population not exceeding five thousand (as shown by the last preceding decennial census), or (ii) the bank holding company, after notice and opportunity for a hearing, demonstrates has inadequate insurance agency facilities; (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982, including (i) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, or approved to be sold on or before May 1, 1982, if such new locations are confined to the State in which the principal place of business of the bank holding company is located, any State or States immediately adjacent to such State, and any State or States in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982, and (ii) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982, or approved to be sold on or before May 1, 1982 (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition); (E) any insurance activity where the activity is limited solely to supervising on behalf of insurance underwriters the activities of retail insurance agents who sell (i) fidelity insurance and property and casualty insurance on the real and personal property used in the opera-

tions of the bank holding company or any of its subsidiaries, and (ii) group insurance that protects the employees of the bank holding company or any of its subsidiaries; (F) any insurance agency activity engaged in by a bank holding company, or any of its subsidiaries, which bank holding company, or any of its subsidiaries, which bank holding company has total assets of $50,000,000 or less: Provided, however, That such a bank holding company and its subsidiaries may not engage in the sale of life insurance or annuities except as provided in subparagraph (A), (B), or (C); or (G) where the activity is performed, or shares of the company involved are owned, directly or indirectly, by a bank holding company which is registered with the Board of Governors of the Federal Reserve System and which, prior to January 1, 1971, was engaged, directly or indirectly, in insurance agency activities as a consequence of approval by the Board prior to January 1, 1971. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern. Notwithstanding any other provision of this chapter, if the Board finds that an emergency exists which requires the Board to act immediately on any application under this subsection involving a thrift institution, and the primary Federal regulator of such institution concurs in such finding, the Board may dispense with the notice and hearing requirement of this subsection and the Board may approve or deny any such application without notice or hearing. If an application is filed under this paragraph in

connection with an application to make an acquisition pursuant to section 13(f) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1823(f)], the Board may dispense with the notice and hearing requirement of this paragraph and the Board may approve or deny the application under this paragraph without notice or hearing. If an application described in the preceding sentence is approved, the Board shall publish in the Federal Register, not later than 7 days after such approval is granted, the order approving the application and a description of the non-banking activities involved in the acquisition; . . . .

APPENDIX C

RECENT DENIALS OF CERTIORARI IN CASES PRESENTING QUESTION OF DEFERENCE TO ADMINISTRATIVE AGENCY

American Waste & Pollution Control Co. v. Ouachita Parish Police Jury, No. 92-1495, 61 U.S.L.W. 3735, 3771 (1993) (court below did not defer)

Aulston v. United States, No. 90-1225, 59 U.S.L.W. 3621, 3763 (1991)

Bullard v. Madigan, No. 90-1272, 59 U.S.L.W. 3641, 3769 (1991)

California Public Util. Comm'n v. FERC, No. 90-505, 59 U.S.L.W. 3334, 3460 (1991) (court below did not defer)

Cedar Coal Co. v. Shuff, No. 92-662, 61 U.S.L.W. 3389, 3478 (1993)

Clark v. Department of the Army, No. 93-515, 62 U.S.L.W. 3308, 3491 (1994)

Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n, No. 90-77, 59 U.S.L.W. 3099, 3247 (1990)

Enron Oil & Gas Co. v. Babbitt, No. 92-1726, 61 U.S.L.W. 3824, 62 U.S.L.W. 3206 (1993)

Independent Ins. Agents of Am., Inc. v. Board of Governors of the Fed. Reserve Sys., No. 89-1620, 58 U.S.L.W. 3726, 59 U.S.L.W. 3243 (1990)

Independent Ins. Agents of Am., Inc. v. Citicorp, No. 91-587, 60 U.S.L.W. 3361, 3478 (1992) (court below did not defer)

Katsis v. INS, No. 93-423, 62 U.S.L.W. 3300, 3472 (1994)

Ludwig v. American Land Title Ass'n, No. 92-645, 61 U.S.L.W. 3384, 3830 (1993) (court below did not defer)

MCI Telecommunications Corp. v. American Telephone & Telegraph Co., No. 92-1684, 61 U.S.L.W. 3796, 3853 (1993) (court below did not defer)

Mesa Operating Ltd. Partnership v. Department of the Interior, No. 91-706, 60 U.S.L.W. 3410, 3498 (1992)

Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, No. 89-1874, 58 U.S.L.W. 3824, 59 U.S.L.W. 3211 (1990)

Miller v. Rice, No. 90-529, 59 U.S.L.W. 3347, 3561 (1991)

PGDH Liquidating Trust v. Shalala, No. 93-348, 62 U.S.L.W. 3202, 3375 (1992)

Puerto Rico Aqueduct v. Comite Pro Rescate, No. 89-1185, 58 U.S.L.W. 3568, 3595 (1990)

Puget Sound Power & Light Co. v. Bonneville Power Admin., No. 90-1415, 59 U.S.L.W. 3713, 3741 (1991)

Quantum Chemical Corp. v. Distillery, Wine and Allied Workers, No. 89-1937, 59 U.S.L.W. 3009, 3244 (1990)

Southern Natural Gas Co. v. Fritz, No. 88-148, 57 U.S.L.W. 3244, 58 U.S.L.W. 3240 (1989) (court below did not defer)

Texas Apparel Co. v. United States, No. 89-769, 58 U.S.L.W. 3399, 3427 (1990)

Wagner Seed Co. v. Bush, No. 91-1140, 60 U.S.L.W. 3586, 3687 (1992)

Western Fuels-Utah, Inc. v. Lujan, No. 89-1728, 58 U.S.L.W. 3759, 59 U.S.L.W. 3244 (1990)

(6)

No. 93-1613

In the Supreme Court of the United States

OCTOBER TERM, 1993

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY,
ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE PETITIONERS

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1. Respondent Variable Annuity Life Insurance Company argues (Br. in Opp. 11)—for the first time—that annuities should be treated as "insurance" for purposes of 12 U.S.C. 92 because a proviso to an exception to a provision of the Bank Holding Company Act specifies "annuities," as well as life insurance, as products that small bank holding companies may sell only under certain circumstances. See 12 U.S.C. 1843(c)(8)(F), reprinted at Br. in Opp. App. 5a. That argument is unpersuasive. Section 1843(c)(8)(F) excepts the sale of annuities from an otherwise general grant of authority to small bank holding companies to engage in "any insurance agency activity." Because annuities have traditionally been underwritten by

insurance companies, Congress might well have considered their sale an "insurance agency activity" for purposes of the Bank Holding Company Act without deeming annuities to be "insurance" for all other statutory purposes. Respondent's argument seeks to equate the meaning of the word "insurance" as used in 12 U.S.C 92, a banking statute passed in 1916, with the meaning of terms used in a proviso added to a bank holding company statute in 1983. Act of Jan. 12, 1983, Pub. L. No. 97-457, § 30(1), 96 Stat. 2511. That is not a correct approach to statutory interpretation. See *Independent Ins. Agents* v. *Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993); see also, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 26 (1983).

2. The Comptroller's decision in this case reasoned (93-1612 Pet. App. 42a-43a) that even if annuities could be considered "insurance," 12 U.S.C. 92 applies only to "types of insurance that are similar to fire and life insurance, such as other general casualty insurance." Respondent disputes that reasoning (Br. in Opp. 9) on the ground that the words "fire, life, or other" in Section 92 describe the type of company for which a covered bank may act as agent, not the types of insurance it may sell. Section 92 provides, however, that small-town banks may "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums on policies issued by such company." The Comptroller could fairly read that language to limit both the types of companies and the types of "insurance" to which Congress intended the statute to apply. In any event, respondent does not seriously contest the petition's point (Pet. 14-17 & n.6) that both the text of Section 92 and its historical

background indicate that in enacting that provision Congress sought to permit banks in small towns to sell a broad range of general insurance products, not to *prohibit* banks generally from selling forms of "insurance" whose sale the Comptroller determines to be incidental to the business of banking.

3. Respondent suggests (Br. in Opp. 12) that the Comptroller's decision to permit banks to sell annuities "reversed the Comptroller's previous interpretation of section 92 in 1978 and 1982," and therefore "is not entitled to significant deference." Even if respondent's factual premise were true, its conclusion would be incorrect. *E.g.*, *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2160-2161 (1993). In fact, however, respondent points to no prior inconsistent administrative precedent.

The 1978 letter reprinted in the Brief in Opposition (at 1a-2a) represents informal advice rendered by an agency lawyer who had no authority to issue binding opinions on behalf of the Comptroller or the agency's Chief Counsel. The letter does not represent a formal interpretation by the Chief Counsel, contains no analysis supporting the views expressed, and clearly identifies its conclusions as the personal opinion of the author. *Ibid.*; compare, *e.g.*, Office of the Comptroller of the Currency (OCC), Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (1990) (Chief Counsel's opinion underlying Comptroller's decision at issue in this case). Such a letter is not an action that would bind the agency or the recipient, be subject to review by the courts, or raise any issue of deference. See *New York Stock Exchange* v. *Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977) (informal Comptroller opinion letter

not ripe for review), cert. denied, 435 U.S. 942 (1978); *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. 491, 494 (W.D. Tex. 1989) (letters from OCC Chief Counsel and staff not final agency action); *American Fed'n of Gov't Employees* v. *O'Connor*, 747 F.2d 748, 752-753 (D.C. Cir. 1984) (advisory opinion of counsel to Merit Systems Protection Board), cert. denied, 474 U.S. 909 (1985).

The 1982 letter that respondent cites (Br. in Opp. 4) sets forth a similar informal opinion by a member of the OCC legal staff. See OCC, Interpretive Letter No. 241, [1983-1984 Transfer Binder] Fed. Banking L. Rep. ¶ 85,405 (1982). That letter's analysis of sales of term life insurance, moreover, does not conflict with the Comptroller's position with respect to sales of fixed and variable annuities. The letter points out that the Fifth Circuit's decision in *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010 (1968), relied on by the court below in this case (see 93-1612 Pet. App. 6a-10a), can be distinguished from the D.C. Circuit's decision in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (1979), cert. denied, 449 U.S. 823 (1980), because *Heimann* involved a specialized insurance product ("credit life" insurance) closely related to the business of banking, rather than the general "automobile, home, casualty and liability insurance" at issue in *Saxon*. In the passage that respondent quotes in part (Br. in Opp. 4), the 1982 letter expresses the view that, unlike sales of credit life insurance, sales of ordinary term life insurance were probably not sufficiently related to the business of banking to come within a bank's general powers under 12 U.S.C. 24 Seventh. In the present case the Comptroller has determined that, even if annuities

are considered "insurance" for purposes of Section 92, sales of annuities are, like sales of credit life insurance (but unlike most sales of general casualty or liability insurance), incidental to the business of banking. 93-1612 Pet. App. 43a. The 1982 letter is therefore consistent with the Comptroller's decision in this case.

4. The court of appeals' opinion makes no distinction between fixed and variable annuities, but forbids national bank sales of annuities of any type. Compare Pet. 4-5, 6 & n.3, 17 n.9. Respondent, on the other hand, attempts (Br. in Opp. 11 n.5) to distinguish this Court's decision in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), which held that certain annuities were not "insurance" for purposes of exemption from the federal securities laws, on the ground that that case dealt only with variable annuities. Respondent's argument concedes the existence of considerable tension between this Court's decision in *SEC* v. *VALIC* and the decision below with regard to variable annuities, which constitute the bulk of annuities currently sold (through banks or otherwise).

5. Respondent contends (Br. in Opp. 15-16) that most bank annuity sales "will be totally unaffected by the outcome of this case." If that assertion were true, it is difficult to understand why respondent would have initiated and pursued this case. Moreover, while it is true that national banks generally market annuities through subsidiaries, respondent does not explain why that fact lessens in any respect the impact of the court of appeals' decision, which overturned the Comptroller's approval of precisely such an arrangement. See Pet. 4. National bank sub-

sidiaries may engage only in activities in which their parent banks could engage directly. See 12 C.F.R. 5.34(c). With respect to state-chartered banks, as amici the American Bankers Association *et al.* point out (Br. 19 & App.), those in three-quarters of the States will effectively be subject to the decision below, because statutes in those States tie the powers of state banks to those exercised by national banks. As the petition points out (at 24), the fact that, under the court of appeals' decision, banks chartered in other States (including New York) will be permitted to market annuities, while national banks and banks chartered in States that follow federal law will not, is a reason for granting, not denying, review in this case. Finally, respondent's contention that banks may be able to market annuities through more elaborate (and presumably less efficient) legal structures, see Br. in Opp. 16, only reenforces the point that the court of appeals erred in substituting its own interpretation of the relevant statutes for the reasoned judgment of the administrator whom Congress has entrusted with primary responsibility for interpretation and enforcement of the federal banking laws. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JUNE 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86158

(2) (2)

Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Petitions for Writs of Certiorari To the United States Court of Appeals For the Fifth Circuit

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, *et al.*,* IN SUPPORT OF PETITIONERS

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May 12, 1994

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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QUESTIONS PRESENTED

1. Whether Section 24 (Seventh) of the National Bank Act, granting to national banks "all such incidental powers as shall be necessary to carry on the business of banking," is broad enough to encompass the sale of annuities, as agent, by national banks to customers.

2. Whether the court correctly construed Section 92 of the National Bank Act as a limitation on the incidental powers of national banks as determined by the Comptroller, notwithstanding that it expressly confers on national banks in small towns insurance agency powers that are "in addition to the powers now vested by law in national banking associations."

3. Whether the statutorily undefined word "insurance," as it appears in Section 92 of the National Bank Act, necessarily includes annuities where the Comptroller of the Currency, charged with the administration of that section of the law, has determined otherwise.

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, et al., IN SUPPORT OF PETITIONERS

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with Supreme Court Rule 37.2. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association, Bankers Roundtable, Association of Banks in Insurance, and Consumer Bankers Association are national trade associations of the commercial banking industry. Most commercial banks in the United States, their employees, their holding companies, and even some insurance companies that market their products through banks are members of one or more of the associations. All the associations represent the interests of both national banks and state-chartered banks in legislatures, regulatory agencies and courts on issues that are of widespread importance to the industry.

The New York State and Louisiana Bankers Associations are the principal trade associations for the banking industry within their respective states. While this case has great importance to banks in all states, banks in these states have interests in the case that are unique.

In Louisiana, a state statute expressly ties the authority of state-chartered banks to sell annuities to the outcome of this case--and does so by name. La. R.S. 6:242 (A)(16). The authority of state-chartered banks to engage in some fashion in the insurance agency business is likewise dependent--at least in large part--upon the ability of national banks to do so under Sections 24 (Seventh) and 92 of the National Bank Act. The matter has been in litigation for four years with no resolution yet in sight. (*See American*

Bank & Trust Co. of Opelousas v. Drake, No. 93-5040 (5th Cir. 1994)(unpublished)). Finally, soon after (and as a direct result of) the decision below, the Insurance Commissioner of Louisiana began an inquiry into the insurance and annuities sales activities of all national banks in the state, clearly with a view toward moving to prevent those activities.

In New York, the Court of Appeals recently upheld the right of state-chartered banks to sell annuities. The decision of the Fifth Circuit thus threatens to upset the delicate and historic balance between the powers of state and federally-chartered banks in New York, the largest banking market in the country. It casts a cloud over the power of national banks in New York, including some of the largest banking organizations in the United States, to sell annuities, at the same time that their State-chartered brethren (also some of the nation's largest banking organizations) now are free to do so without limitation. This result is all the more anomalous because the two governing statutes are identical for this purpose, and indeed the state law served as the model for the National Bank Act.[1] Rules of statutory construction provide that what a predecessor statute means is instructive of what an adopting statute means as well.[2]

Even more significant, the continuing vitality of the national bank charter, in New York and other states, is in question if the decision below stands. The Fifth Circuit's narrow construction of the National Bank Act's "incidental

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[1] Symons, The "Business of Banking" in Historical Perspective, 51 Geo. Wash. L.Rev. 676, 689 (1983).

[2] *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 308 (1898).

powers" clause stands in stark contrast to the progressive, forward-looking reading of the identical language under New York law by the New York Court of Appeals--a difference that cannot fail to be noted by national banks in the highly competitive New York market. Indeed, within the past year at least three New York institutions have surrendered their national charters in favor of a state charter.

The NYSBA participated actively in *New York State Association of Life Underwriters v. New York State Banking Department*, 83 N.Y.2d 353 (NY 1994). Indeed, the litigation arose directly from a NYSBA initiative. The NYSBA thus is uniquely well situated to elucidate the issues decided by *NYSALU* and their relevance to this case.

REASONS FOR GRANTING THE WRIT

It is critical for the Court to review the decision of the Fifth Circuit below for three reasons: The decision is inconsistent with other U.S. Courts of Appeals in several different respects, creating conflicts that need to be resolved; the Fifth Circuit has acted inconsistently with this Court's decision in *Securities & Exchange Commission v. Variable Annuity Life Insurance Company*; and the decision could have serious economic consequences to the banking industry and the public.

I. The Conflicts Among the Circuits

A. Incidental Powers

The National Bank Act, now 130 years old, grants to national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." The test for what constitutes "the business of

banking" or ascertaining what powers are "incidental" to that business is perhaps the most critical issue imaginable for the banking industry. It will, in large measure, determine whether a multi-billion dollar industry will be able to adapt to new, rapidly and constantly changing economic realities or will stagnate and ultimately wither away.

In the case below, the Fifth Circuit has opted for stagnation. The test it adopts for assessing the validity of a proposed "incidental" power is especially parsimonious:

> Even conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed "necessary."

Variable Annuity Life Insurance Company v. Clarke, 998 F.2d 1295, 1302 (5th Cir. 1993) (hereinafter "*VALIC*").

Only if the word "necessary" means "absolutely essential" or "indispensable" does the quoted sentence make any sense at all. But that is not what the word means. As this Court has often held, construing the same word in Article I, Section 8, clause 18 of the Constitution, the word "necessary" includes all appropriate means which are conducive or adapted to the end to be accomplished. *Legal Tender Case*, 110 U.S. 421, 440 (1884). *See also Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 473 (1894); *Legal Tender Cases*, 79 U.S. 457, 534 (1871); *M'Culloch v. Maryland*, 17 U.S. 316, 413-15 (1819). It is no stretch of the imagination to think that the sale of annuities by national banks is "necessary" as so understood.

Other circuits have rejected the "necessary" test here imposed by the Fifth Circuit. In *M&M Leasing Corp. v.*

Seattle First National Bank, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the Ninth Circuit held that the National Bank Act "did not freeze the practices of national banks in their nineteenth century forms.... [T]he powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." That case involved lease financing of automobiles, an activity that was not within the contemplation of Congress when the National Bank Act was enacted in 1864. In addition, since many banks have been known to conduct their businesses successfully without engaging in the business of lease financing, the business would hardly seem to be "necessary" as the Fifth Circuit understands that word. Nevertheless, the Ninth Circuit upheld the ability of the banks to engage in the lease financing business as a proper exercise of their "incidental" powers. *See also American Insurance Association v. Clarke*, 865 F.2d 278, 281-282 (D.C. Cir. 1988) and *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 778 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990).

The First Circuit has a different test for examining what is or is not an incidental power of national banks. According to that court, an activity of a national bank is authorized as an incidental power "if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972). It is no stretch of the imagination to think that the sale of annuities by a national bank is convenient and useful, and connected to performance of the express powers granted to the national bank to purchase and sell securities "without recourse, solely upon the order, and for the account of, customers, and in no case

for its own account." 12 U.S.C. § 24 (Seventh).[3]

In short, the decision of the Fifth Circuit, with respect to the matter of construing the "incidental powers" clause of the National Bank Act is incompatible with the decisions of the Ninth, District of Columbia, Eighth and First Circuits on the same matter. The Fifth Circuit's "necessary" test is not limited to the question of whether the sales of annuities fits within the "incidental powers" clause of the statute. Rather, the test will--if unreviewed and unreversed--be broadly applied in future and could be interposed as a bar to all manner of activities of national banks that are not absolutely indispensable to banking but which are, nonetheless, logical, reasonable accommodations to a financial world greatly different from the world of 1864, or to a future financial world greatly different even from today. Meanwhile, national banks in other circuits will be governed by different and more practical rules. In fact, as interstate banking becomes more prominent, the same banking institution can find itself subject to conflicting rulings. This case demonstrates that point quite graphically. NationsBank is headquartered in North Carolina, within the Fourth Circuit, yet finds its activities limited by a decision of the Fifth Circuit. Court should grant the petitions in order to restore a uniformity in the interpretation of this critical grant of authority to national banks.

B. Scope of Section 92

Section 92 of the National Bank Act, 12 U.S.C. § 92,

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[3] This Court, of course, has held that variable rate annuities **are** securities. *Securities and Exchange Commission v. Variable Annuity Life Insurance Company*, 359 U.S. 65, 67-68 (1959).

provides in relevant part that "[i]n addition to the powers now vested by law in national banking associations...any such association located and doing business in any place the population of which does not exceed five thousand inhabitants ....may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company...."

Last term, this Court held that Section 92 continues to exist, notwithstanding an apparent scrivener's error. *U.S. National Bank v. Independent Insurance Agents of America*, 113 S. Ct. 2173 (1993). Left open, now that the question of Section 92's existence is resolved, is the question of what it means. That is an especially important question of federal law since Section 92's meaning is at issue in pending litigation all over the country. *See, for example, Barnett Bank of Marion County v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), *appeal pending*, 11th Cir. No. 93-3508; *Owensboro National Bank v. Stephens*, 803 F. Supp. 24 (E.D. Ky. 1992), *appeal pending*, 6th Cir. Nos. 92-6330, 92-6331; *Shawmut Bank Connecticut, N.A. Googins*, No. 3:94 CV 146 (JAC)(D. Conn., filed February 1, 1994); *First Advantage Insurance v. Green*, No. 365352 (Louisiana 19th Jud. Dist. Ct., November 18, 1993), *appeal pending*, La.App. 1st Cir. No. 94/CA/0813.

The Petitions in these cases both correctly point out that there is a conflict in the circuits over the scope of Section 92. The Fifth Circuit's decision below holds, by negative inference, that Section 92 is a limitation upon the powers of national banks in larger cities to sell insurance: "Section 92 explicitly authorizes national banks in towns with a population smaller than 5,000 to act as insurance agents, and impliedly prohibits national banks in towns with a population larger than 5,000 from acting as insurance

agents." *VALIC* at 998 F.2d 1298. The Second Circuit has reached a similar conclusion in *American Land Title Association v. Clarke*, 968 F.2d 150 (2d Cir.), *cert. denied*, 113 S. Ct. 2959 (1993). On the other hand, the District of Columbia Circuit (*Independent Bankers Association of America v. Heimann*, 613 F.2d 1164, 1169-70 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980)) and the Eighth Circuit (*Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n. 6 (8th Cir. 1984) have concluded that Section 92, which by its own terms is an **additional** grant of power, has nothing to do with the powers that may or may not be exercised by national banks in larger towns.

Both the District of Columbia and Eighth circuits have subsequently followed the precedents set in their respective cases in a manner that does not admit of the characterization of their opinions as "dicta." In *American Insurance Association v. Clarke*, *supra*, 865 F.2d 278, the court found that sale of municipal bond assurance (though undoubtedly "insurance") by a national bank through a subsidiary was a proper exercise of the bank's incidental powers. It did not matter that the bank in question, Citibank, N.A., was located in New York City, a place with more than 5,000 inhabitants. Similarly, in *First National Bank of Eastern Arkansas v. Taylor*, *supra*, 907 F.2d 775, the court determined that the sale of "debt cancellation contracts" by a national bank was incidental to banking. This was so notwithstanding the Arkansas Insurance Commissioner's holding that the contracts were "insurance" subject to his regulation, and notwithstanding the fact that the bank was (and is) located in Forrest City, Arkansas,

population 13,364.[4]

i. The Special *Chevron* Problem

Both petitions for writs of certiorari in these cases rely heavily upon what they perceive to be the Fifth Circuit's failure to follow this Court's directive in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In this respect, we note yet another conflict between Circuits created by the Fifth Circuit below.

Chevron crafted a two-part test: "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress....[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." 467 U.S. at 842-43.

The Fifth Circuit pays lip service to *Chevron*. It concludes that the intent of Congress is "clear" in this case from the plain language of Section 92 and from its legislative history. *VALIC*, 998 F.2d at 1300. That being so, the court purports to give effect to that legislative intent and does not reach the second part of the *Chevron* test.

The District of Columbia Circuit, on the other hand, has an entirely different and incompatible view of Section 92. After this Court's decision in *U.S. National Bank*, *supra*, the case was remanded to the District of Columbia Circuit to resolve an interpretive matter regarding Section 92 that it had left unresolved prior to this Court's consideration

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[4] Polk Financial Institutions Directory, Spring 1993 (Arkansas) p. 14.

of the case. That case, like this one, involved a national bank headquartered in a large city; that case involved the efforts of the bank to sell insurance generally (from a small-town branch), and this case involves the efforts of the bank to sell annuities (which the Fifth Circuit has held--incorrectly--to be "insurance"); that case, like this one, involved the efforts of the bank to sell the product to customers who were not necessarily residents of small towns; that case, like this one, involved approval by the Comptroller of the Currency of the bank's activities; that case, like this one, involved allegations by the insurance industry that the proposed activities were impliedly prohibited by Section 92 of the National Bank Act.

Nevertheless, the District of Columbia Circuit, looking at **exactly** the same statute and **exactly** the same legislative history as the Fifth Circuit, concluded that the law was anything but clear and unambiguous:

> [T]he words and structure do not reflect an unambiguous intent on the issue....[W]e find nothing in th[e] history to suggest an unambiguous congressional intent on the precise question at issue. Furthermore, it is not our job to divine how legislators would have responded to hypotheticals...particularly where the question is as unknowable as the reaction of 1916 legislators to a world of microchips, communications satellites, fax machines, direct mail and telephone solicitation, and all of the other technologies and techniques that now enable a nationwide business to be conducted from any hamlet.

Independent Insurance Agents of America v. Ludwig, 997

F.2d 958, 960-961 (D.C. Cir. 1993) (citation omitted).

Having found a lack of clarity in Section 92, its language, structure and legislative history, the District of Columbia Circuit did what the Fifth Circuit refused to do; it moved on to the second part of the *Chevron* test and, under it, readily upheld the interpretation of the Comptroller.

In short, both the Fifth and the District of Columbia Circuits purport to follow the *Chevron* doctrine. But there is a clear conflict between them in how the doctrine is to be applied in the context of interpreting Section 92 of the National Bank Act. The District of Columbia Circuit is willing to accept the fact that the world has changed since 1916 to such a degree that it is no longer possible to say that the legislators of that era have spoken directly to today's problems. The Fifth Circuit is not willing to do so, imputing to 1916 legislators an "intent," for example, to have "annuities" included within the meaning of "insurance" when there is no evidence that Congress ever even thought about the matter.[5] Did the 1916 Congress address--specifically--what "insurance" activities national banks could engage in outside the boundaries of small towns? The Fifth Circuit below says "yes"; the District of Columbia Circuit says "no." This Court should resolve the conflict.

C. Annuities as "Insurance"

In our view, it should not much matter whether annuities are deemed to be "insurance" products for purposes

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[5] This is an especially great leap of logic with respect to variable annuities since the first such instrument apparently did not come upon the scene until 1952--thirty-six years later. *See SEC v. VALIC*, 359 U.S. at 69.

of this case or not. The critical question is whether or not the sale as agent of annuities fits within the "business of banking" or is one of the powers incidental thereto. If such sales are authorized under Section 24 (Seventh) of the National Bank Act, then those sales may be conducted by all national banks, regardless of their location, unless the power is taken away specifically by some other federal statute. As we suggest above, and as the District of Columbia and Eighth Circuits have held, Section 92 of the National Bank Act does not take away from national banks in large towns the capacity to do that which is incidental to banking even if the incidental power in question involves or might be deemed to involve the sale of insurance as agent.

Only if Section 92 is held to be a limitation on incidental "insurance" powers of large-town national banks (which it is not) does the issue of whether a particular product is "insurance" even arise.

The Fifth Circuit below wrongly concluded that Section 92 is a limitation, and then wrongly concluded again that annuities are "insurance." It reached the second conclusion by a manifestly flawed analysis that is inconsistent with precedents, not only of other U.S. Courts of Appeals, but also of highly relevant state court decisions, and even of other panels of the Fifth Circuit itself.

Most egregious of all, however, the Fifth Circuit decision below flies in the face of this Court's decision--which the Fifth Circuit cites but then flagrantly ignores--in a case involving the very same "insurance company" that is a party to this case.

In *Securities & Exchange Commission v. Variable Annuity Life Insurance Company*, 359 U.S. 65 (1959), as in

this case, the relevant federal statute used, but did not define, the word "insurance." In that case, as in this one, the relevant statute granted broad rule-making authority to a federal regulatory agency to administer the statute. In that case, as in this one, the Variable Annuity Life Insurance Company claimed that variable annuities were "insurance" products within the meaning of the applicable federal statute, while the regulatory agency charged with administration of the statute contended that they were not. In that case, as in this one, the best proof offered that annuities were insurance was the unremarkable fact that they were regulated as such under the insurance laws of all the states. (*Compare SEC v. VALIC*, 359 U.S. at 67, with *VALIC*, 998 F.2d at 1300).

In that case, however, this Court declined the opportunity to give binding effect to state insurance law characterizations of annuities: "In any event how the States may have ruled is not decisive. For, as we have said, the meaning of 'insurance' or 'annuity' under these Federal Acts is a federal question." *SEC v. VALIC*, 359 U.S. at 69.

On this key point, the Fifth Circuit departed from this Court's analysis. The fatal flaw in the decision below is the refusal to accept the basic proposition that the answer to the question of what a particular word means often depends on why the question was asked. Thus, for example, this Court had no trouble holding that an institution chartered as a bank and insured and regulated as such by the Federal Deposit Insurance Corporation was, nevertheless, not a bank for purposes of the Bank Holding Company Act. *Board of Governors of the Federal Reserve System v. Dimension*

Financial Corp., 474 U.S. 361 (1986).[6]

With respect to the meaning of the word "insurance" for federal banking law purposes, the Comptroller of the Currency determined that "debt cancellation contracts" did **not** fit within that category, and therefore could be offered by national banks as an exercise of "incidental powers," despite the protestations of the Arkansas Insurance Commissioner that such contracts were the functional equivalent of credit life insurance policies and were therefore subject to his jurisdiction. The Eighth Circuit agreed with the Comptroller: "**Because** debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute ' the business of insurance' under the McCarran-Ferguson Act." *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d at 779. This is not to say that the Commissioner's interpretation of Arkansas insurance law was wrong (any more than other state treatment of "annuities" as insurance in the *SEC v. VALIC* case was "wrong"), only that the state insurance laws were not at issue in that case. The National Bank Act was at issue--just as in this case. When the

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[6] *See also First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969)(facility is a "branch" under McFadden Act, though not a "branch" under state law.), *FDIC v. Philadelphia Gear*, 476 U.S. 426 (1986)(promissory note under Oklahoma Commercial Code is not a promissory note for purposes of Federal Deposit Insurance Act) and, ironically, the Fifth Circuit's own decision in *Department of Banking v. Clarke*, 809 F.2d 266 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (state chartered savings and loan association was a "bank" for purposes of the federal McFadden Act, even though it would never have been classed as such by the state law under which it existed).

application of state insurance laws to debt cancellation contracts was at issue, the Arkansas Supreme Court held that those contracts **did** fit within the state law definition. *Douglas v. Dynamic Enterprises*, 315 Ark. 575, 869 S.W.2d 14 (Ark. 1994). The court acknowledged the earlier decision of the Eighth Circuit, and did not disagree with it. It merely held that the Circuit decision was of limited applicability because it "involves a federal activity and a matter of federal law." *Id.*, 869 S.W.2d at 17.

That is precisely the point here. Words mean different things in different contexts. It does not matter, for example, if "annuities" are insurance products for purposes of the Internal Revenue Code (which by specific statutory definition provides that an insurance company is a company that issues life insurance **and** annuity contracts.[7] 26 U.S.C. § 816(a)). In the absence of a specific statutory definition in the federal banking laws, there is no reason necessarily to conclude that annuities are insurance products for purposes of those laws as well.

Another recent example of this point is New York Court of Appeals decision in *New York State Association of Life Underwriters v. New York State Department of Banking*, 83 N.Y.2d 353 (N.Y. 1994). New York is one of the states mentioned by the court below as regulating annuities as insurance products for purposes of the state insurance laws. *See* N.Y. Ins. Law § 1113(a)(2) (McKinney 1990). That fact did not dissuade New York's highest court from holding that annuities are **not** an insurance product for purposes of

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[7] The use of the conjunctive suggests that, for purposes of the Code, annuities are something different from and in addition to life insurance. *See, e.g., Areizaga v. Quern*, 442 F. Supp. 168, 173 (N.D. Ill. 1977).

the state's banking laws. The court's analysis was based extensively (as should be the case here) upon an evaluation of whether annuities fit within the incidental powers of banks. Having determined that the fit was good, the court went on to say that

> we reject the assertion that annuities are insurance which banks are not authorized to sell. To be sure, Insurance Law § 1113(2) includes "annuities" in its description of "kinds of insurance authorized." However, the great weight of authority supports the position that annuities are not insurance.

Id., *supra*, 83 N.Y.2d at ____ .

Finally, the Fifth Circuit itself deals differently with annuities depending upon context. In the case below, it was more than willing to hold that annuities are insurance for purposes of Section 92 of the National Bank Act. But simultaneously with the consideration of this case, a different panel of the court was resolving *In re Newman*, 993 F.2d 90 (5th Cir. 1993). There the court held that an annuity is a "general intangible" for purposes of the Texas Uniform Commercial Code. Without using the words, the panel necessarily held, therefore, that an annuity is **not** an insurance product. Under the Uniform Commercial Code, Section 9-104(7), insurance policies are not "general intangibles." *See VALIC v. Clarke*, 13 F.3d 833, 837 (Smith, J., dissenting).

In summary of this point, context matters. It matters to this Court, to other circuits, and to state appellate courts. It did not seem to matter to the panel of the Fifth Circuit that decided this case: If the Internal Revenue Code and state

insurance laws treat annuities as insurance, then annuities must be insurance, at all times, for all purposes, period.[8] Because the panel's opinion deviates so greatly from otherwise settled law in this respect, this Court should grant the petitions in this case to :esolve the conflict.

II. The Importance of the Issue

Much of the discussion set forth above in the context of describing the conflicts between the Fifth Circuit panel's opinion and other courts' opinions dealing with related or even identical subjects also points up the importance of the legal issues in this case. The matter is likewise of great practical economic consequence as well. Both of the

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[8] To be fair, the panel also holds that annuities are "functionally" insurance products as well. *VALIC*, 998 F.2d at 1301. In so holding, the court has placed itself in conflict with this Court and numerous other courts--again including itself. *See Helvering v. LeGierse*, 312 U.S. 531, 542 (1941)(describing an annuitant's risk as an investment risk, not an insurance risk); *Corporation Commission v. Equitable Life*, 73 Ariz. 171, 239 P.2d 360, 363 (Ariz. 1951) (annuities are investments, not a risk based on contingency of loss); *Prudential Insurance Company v. Howell*, 29 N.J. 116, 148 A.2d 145, 148 (N.J. 1959)(life insurance and annuities are diametric opposites); *State ex rel. Equitable Life Assurance Society v. Ham*, 54 Wyo. 148, 88 P.2d 484, 488 (Wyo.1939) (purchase price of annuity is not a life insurance premium); *Daniel v. Life Insurance Company of Virginia*, 102 S.W.2d 256, 260 (Tex.Civ.App. 1937)(annuity is essentially a form of investment); *In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987)(same); *New York State Association of Life Underwriters v. New York State Department of Banking*, *supra*.

petitions for writs of certiorari describe in detail the fact that annuity sales are a large and burgeoning part of the business of banking. Banks have achieved a significant share of the annuities market in a comparatively short period of time, even in the face of delays and disincentives arising from judicial and administrative assaults by the competitor insurance industry and some state insurance commissioners. The ability of banks to move so swiftly into the market suggests quite clearly a previously unmet consumer need or a consumer preference for dealing with banks rather than insurance salesmen on financial matters. The Fifth Circuit decision, if unreviewed, will not only have the effect of depriving banks of a business that they perform well, but will also deprive consumers of the competitive marketplace choices they now seem to enjoy. Indeed, since VALIC does business in all fifty states, it has the capacity to challenge any national bank, anywhere, selling annuities, and to do so in the Fifth Circuit where the company is located.

The Fifth Circuit decision is harmful to robust competition in other respects as well. While the decision officially applies only to national banks approximately thirty-seven states have so-called "wild card" or "parity" statutes on their books. With variations, these statutes generally authorize state-chartered banks to exercise the same powers that may be exercised by national banks within the state, notwithstanding anything else in state banking laws.[9] In many states, therefore, a decision to the effect that national banks may not sell annuities is necessarily also a decision that state-chartered banks may not sell annuities, thus harming the business opportunities of those banks and their customers.

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[9] See Appendix to this brief for collection of citations.

Finally, there are those states that do allow annuity sales by their own state-chartered banks. As indicated above, New York is the most recent example. National banks in direct competition with such state-chartered banks as "full service" financial institutions will be at a decided disadvantage, to no good end.

Judge Smith's opinion, dissenting from the denial of suggestions for rehearing en banc in the court below, summarizes this point best when he writes that "[t]he panel's holding, moreover, seriously thwarts competition in a major market, with no indication that that is what Congress intended." *VALIC*, 13 F.3d 833, 834 (Smith, J., dissenting[10]). On those grounds alone, this Court should grant the petitions for writs of certiorari.

CONCLUSION

For all of the reasons above, your amici respectfully urge the Court to grant the Petitions.

Respectfully submitted,

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[10] Judge Smith's opinion expressed the view of four members of the court that the decision of the three-judge panel should have been reheard en banc. Only the large number of recusals prevented that from happening. *Id.*

APPENDIX

APPENDIX

Wild Card/Parity Statutes

Alaska	Sec. 06.01.020
Arizona	Sec. 6-184(2)
Arkansas	Sec. 23-32-701(16)
Colorado	Sec. 11-2-103
Florida	Sec. 655.061
Georgia	Sec. 7-1-61(a)(1)
Hawaii	Sec. 403-47.1
Idaho	Sec. 26-1101(3)
Illinois	205 ILCS 5/5(11)
Kansas	Sec. 9-1715
Kentucky	Sec. 287.020
Louisiana	Tit. 6, § 242(C), Revised Stat.
Maine	Tit. 9B, §416
Maryland	Sec. 5-504 of Fin. Inst. Art.
Minnesota	Sec. 48.15 (Subd. 2)
Mississippi	Sec. 81-5-1(10)
Missouri	Sec. 362.105(3)
Montana	Sec. 32-1-362
Nevada	Sec. 662.015(1)(f)
New Hampshire	Ch. 394-A:7
New Jersey	Sec. 17:9A-24a and 17:9A-25(12)
New Mexico	Sec. 58-1-54
North Dakota	Sec. 6-03-38
Ohio	Sec. 1125.23
Oklahoma	T.6, § 203
Oregon	Sec. 707.340

South Carolina	Sec. 34-1-110
South Dakota	Sec. 51A-2-14
Tennessee	Sec. 45-2-601
Texas	Sec. 342-113(a)(4) of Civil Statutes
Utah	Sec. 7-1-301(3)
Vermont	T.8, §1163
Virginia	Sec. 6.1-5.1
Washington	Sec. 30.04.215
West Virginia	Sec. 31A-3-2(a)(5)(B)
Wisconsin	Sec. 220.04(8)
Wyoming	Sec. 13-3-704

(4)

Nos. 93-1612 and 93-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of this Court, this brief is respectfully submitted by The New York Clearing House Association (the "Clearing House") with the consent of all parties.

INTEREST OF *AMICUS CURIAE*

The Clearing House is an unincorporated association of eleven leading commercial banks in the City of New York.[1] Four of the Clearing House member banks are national banking associations subject to the National Bank Act (the "NBA")[2] and, thus, to the supervision and regulation of petitioners the Comptroller of the Currency and the Office of the Comptroller of the Currency (together, the "OCC"). The Clearing House frequently appears as an *amicus curiae* in cases, such as this, raising important questions of banking law.

The Clearing House has a substantial interest in the questions presented by the petitions for a writ of certiorari (the "Petitions") filed herein because of its member banks' interest and involvement in the sale of annuities. In addition, in reliance on the regulations and authorizations of the OCC and other banking regulators, Clearing House member banks sell other products related to their conduct of the business of banking that, unlike annuities, are generally considered insurance. Those products include credit life, credit disability, mortgage life, mortgage disability, and involuntary unemployment insurance.

As a result of the decision below, national banks that are now engaged in, or that are considering engaging in, the sale

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

[2] Ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code).

of annuities and credit-related insurance products may face legal challenges to their power to do so. In addition, the Fifth Circuit's unduly narrow construction of the "incidental powers" clause contained in Section 24 (Seventh) of the NBA has engendered confusion regarding the scope of recognized powers of national banks. The OCC has authorized national banks to engage in numerous activities, not specifically enumerated in the NBA, that are incidental to the business of banking, and commercial banks have expended substantial resources in reliance on those authorizations and are presently providing such services to millions of their customers.

Both law and business necessity compel Clearing House member banks to rely on the interpretations of the federal banking laws of the OCC and other banking agencies. Member banks frequently invest substantial time and money introducing new products and services in reliance on such interpretations. The Fifth Circuit's invalidation of the entirely rational OCC determination that national banks may sell annuities as agents disrupts the regulatory predictability and stability that are indispensable to the business of banking and the ability of banks to serve their customers.

SUMMARY OF ARGUMENT

1. As recognized by the four judges who dissented from the Fifth Circuit's denial of rehearing *en banc*, "[n]o one can seriously question the importance of this case to the banking industry and to commerce and competition in general." (NationsBank of North Carolina ("NBNC") Pet. App. at 21). This Court should grant certiorari because the erroneous decision of a single panel of the Fifth Circuit, if left to stand, may force national banks to exit the market, now totalling almost $100 billion annually, for the sale of annuities. Banks possess almost twenty percent of this profitable and still rapidly growing market. The decision of a panel of the Fifth Circuit—which was not reheard *en banc*, although a majority of that court's active judges who did not

recuse themselves voted in favor of rehearing—also calls into question the power of banks to sell other financial and insurance products that have become an increasingly important source of revenue for commercial banks and an increasingly significant component of the services that banks provide to their customers.

2. The Fifth Circuit directly contravened this Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), in refusing to defer to the OCC's determination that annuities are not "insurance" for purposes of the supplementary insurance powers provisions of 12 U.S.C. § 92, and in engaging in a *de novo* analysis of that issue. There was no basis in either the text or the legislative history of Section 92 for the Fifth Circuit to override the OCC's reasonable interpretation of the statute that the OCC is charged with administering. Moreover, the Fifth Circuit ignored overwhelming authority holding that annuities are not insurance, but rather a form of financial investment instrument of the sort that national banks have long sold pursuant to their express power to engage in all aspects of the "business of banking."

The analysis and result below also ran afoul of the *Chevron* deference rules in rejecting the OCC's construction of the "incidental powers" clause of Section 24 (Seventh) of the NBA to authorize national banks to broker annuities as part of their historical role as agents for the sale of securities and other financial investment instruments. The OCC reasonably concluded in the exercise of its informed judgment and on the basis of its knowledge and experience in the regulation of commercial banking that the sale of annuities is an element of the "business of banking" within the meaning of Section 24 (Seventh). The Fifth Circuit not only impermissibly substituted its own views on the matter for the OCC's interpretation, but departed in approach and result from other case law, including the New York Court of

Appeals' recent interpretation of the provision on which the "incidental powers" clause of Section 24 (Seventh) was based and its application to the sale of annuities by New York-chartered banks. *See New York State Ass'n of Life Underwriters, Inc.* v. *New York State Banking Dep't*, 1994 N.Y. LEXIS 324 (N.Y. Ct. App. Mar. 30, 1994) ("*NYSALU*").

3. The decision below has deepened the important conflict among the courts of appeals over whether Section 92 impliedly bars national banks located in communities of more than 5,000 from acting as agents for the sale of certain specialized insurance products related to the conduct of the business of banking. The Second and Fifth Circuits, in reliance on case law that pre-dates this Court's decision in *Chevron*, have held that Section 92 bars such activities, while the D.C. Circuit has concluded that it does not. The ability of national banks to engage in significant activities, especially activities that increase competition, should not be governed by the fortuity of the location of a bank or the venue in which the bank's actions may be challenged.

4. The Fifth Circuit's clear departure from the established principle of judicial deference to the OCC's reasonable interpretation of NBA provisions threatens regulatory predictability and stability in the banking industry. If national banks could not rely on OCC regulations under, and interpretations of, the NBA, they would be deprived of the predictability necessary to the development of innovative commercial banking practices.

REASONS FOR GRANTING THE PETITIONS

I.

THE PETITIONS PRESENT QUESTIONS OF EXCEPTIONAL IMPORTANCE TO NATIONAL BANKS AND THE NATION'S ECONOMY.

The sale of annuities in the United States is now estimated to total approximately $100 billion annually. *See* Karen Talley, *N.Y. Banks Gearing Up Annuities After Ruling*, The American Banker, Apr. 7, 1994, at 12. Annuities compete directly with other popular investment products, such as certificates of deposit, mutual funds and stocks and bonds; and they "have become the retirement vehicle of choice for many Americans." Kalen Holliday, *Annuities Head List Of Insurance Products At Banks, Study Finds*, The American Banker, Sept. 30, 1993, at 20. They are particularly important because they permit investors to defer the taxation of their investment gains. *See* 26 U.S.C. § 72.

Although annuities were sold primarily by insurance companies in the past, commercial banks have substantially increased their sale of annuities in recent years in response to their customers' demands for more sophisticated, flexible and higher-yielding products than conventional bank accounts. More than seventy of the nation's 100 largest banks now offer annuities to their customers. *See* Karen Talley, *Bank Annuity Sales Seen Surging in '93*, The American Banker, June 30, 1993, at 17. In 1993, commercial banks' annuity sales reportedly reached an estimated $16 billion annually, *see id.*, and such sales represented about seven percent of all bank brokerage activity. *See* Kurt Cerulli & David Nadig, *Variable Annuities Add a Steady Flow to Bank Brokerages' Revenue Streams*, The American Banker, July 14, 1993, at 12. Securities firms and other financial service providers are also major sellers of annuities.

As part of their historical function as financial intermediaries, commercial banks have long possessed broad powers to buy and sell financial instruments as agents for their customers. *See Securities Indus. Ass'n* v. *Federal Reserve Bd.*, 468 U.S. 207, 215 (1984). In response to substantially increased competition from other financial intermediaries, such as savings banks, securities brokerage firms and mutual funds, commercial banks have expanded their brokerage of securities, annuities and other financial investment instruments where natural synergies with their core banking businesses exist. *See* U.S. Department of the Treasury, *Modernizing the Financial System: Recommendations for Safer, More Competitive Banks*, Fed. Banking L. Rep. (CCH), No. 1377 at XVIII-9-XVIII-23 (Feb. 14, 1991). Such brokerage activities have generated substantial revenue for banks without posing a risk to their safety or soundness and have benefited consumers by increasing the availability, and reducing the cost, of financial investment instruments, such as annuities. *See* David Shapiro & Thomas F. Streiff, *Annuities* 17 (1992).

The decision below has created uncertainty regarding whether national banks may continue to sell annuities and may open the door to legal challenges to the ability of banks to sell other products, such as credit life, credit disability, mortgage life, mortgage disability, and involuntary unemployment insurance, that are incidental to the business of banking. More generally, the decision calls into question the extent to which national banks may continue to respond to the needs of their customers in the rapidly changing marketplace for financial products. These considerations clearly warrant exercise of this Court's plenary jurisdiction; they are all the more compelling given that the decision below represents the view of only a minority of the judges of the issuing circuit who considered the matter and was sharply criticized by the judges who supported the suggestions for rehearing *en banc*.

(*See* NBNC Pet. App. 20a (panel "badly erred"); *see also* OCC Pet. at 21-22; NBNC Pet. 9-10).

In addition, the importance of the questions presented here has been augmented by the recent decision of the New York Court of Appeals confirming that the "incidental powers" clause of the New York Banking Law—which served as the model for the predecessor of Section 24(Seventh)—empowers New York-chartered banks to sell financial investment instruments such as annuities and to adapt their product lines to meet changing economic conditions and the evolving demands of commercial banking customers. *See NYSALU*, 1994 N.Y. LEXIS 324 (N.Y. Ct. App. Mar. 30, 1994). Unless this Court reverses the Fifth Circuit's decision, national banks, including certain Clearing House member banks, would be placed at a distinct disadvantage vis-a-vis New York-chartered banks (and banks chartered elsewhere that follow the New York approach) devaluing their federal charters.

II.

THE FIFTH CIRCUIT DEPARTED FROM *CHEVRON* IN OVERRIDING THE OCC'S REASONABLE CONSTRUCTION OF TWO IMPORTANT PROVISIONS OF THE NBA.

This Court has long recognized the necessity of judicial deference "to [an agency's] construction of a statutory scheme it is entrusted to administer." *Chevron* v. *Natural Resources Defense Council*, 467 U.S. at 844 (footnotes omitted); *see also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-06 (applying *Chevron* to OCC's interpretation of federal banking laws). The Fifth Circuit violated this principle of deference in overruling the OCC's reasonable interpretation of Sections 92 and 24 (Seventh) of the NBA.

1. As the Petitions demonstrate, the Fifth Circuit's decision that annuities are "insurance" for purposes of

Section 92, and its method of arriving at that conclusion, conflict sharply with *Chevron*. (*See* OCC Pet. at 11-14; NBNC Pet. at 14-22). The Fifth Circuit plainly erred in "substitut[ing] its own construction of a statutory provision for [the OCC's] reasonable interpretation." *Chevron*, 467 U.S. at 844. There is nothing in Section 92 or its legislative history indicating Congress' intent—much less "clear" intent, as is required by *Chevron*—that annuities be considered "insurance" within the meaning of that statute. Because Congress has never addressed that "precise question," it was plainly within the province of the OCC to interpret the statute, and mandatory for the Fifth Circuit to defer to that interpretation. *Id*. at 843.

Indeed, the respective determinations that annuities are not a form of insurance by the New York Court of Appeals in *NYSALU* and of the Fifth Circuit judges who dissented from the denial of the suggestions for rehearing *en banc* demonstrate powerfully that the OCC had far more than a reasonable basis for construing Sections 24 (Seventh) and 92 to permit national banks to broker annuities and that there was no justification for the panel below to have substituted its view for the OCC's. As the Petitions establish, "the great weight of authority" conflicts with the Panel's conclusion and, instead, "supports the position that annuities are not insurance." *NYSALU*, 1994 N.Y. LEXIS 325 at 14, *quoted in* OCC Petition at 13; *see also* NBNC Petition at 15-16.

The Fifth Circuit, in impermissibly substituting its judgment for the OCC's, focused solely on annuities for which the benefits are paid over the duration of the annuitant's life (a life income option). (*See* NBNC Pet. App. at 12a, 27a). Most annuities are structured, however, such that benefits are paid for a specified period of time (*e.g.*, 5, 10 or 15 years) (a term certain option) or in a lump-sum distribution of the entire cash value of the annuity. *See* David Shapiro & Thomas R. Streiff, *Annuities*, *supra*, at 2-4 (describing different types of annuities).

Contrary to the conclusion of the Fifth Circuit (NBNC Pet. App. at 11a), the fact that "[a]ll fifty states currently regulate annuities under their insurance laws" does not strip annuities of the characteristics of a financial investment instrument and render them forms of insurance. "'Banking' and 'insurance' are not mutually exclusive businesses; 'from a functional point of view there is a considerable overlap between the [two].'" *American Ins. Ass'n* v. *Clarke*, 656 F. Supp. 404, 409-10 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988) (quoting Henry Harfield, *Bank Credit and Acceptances* 184 (5th ed. 1974)) (brackets in original).

2. The Fifth Circuit also departed from *Chevron* in rejecting the OCC's reasonable interpretation of Section 24 (Seventh) to include the power to sell annuities within that section's authorization to national banks to "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."

It was plainly within the province of the OCC to construe the technical terminology of the "incidental powers" clause to permit national banks to broker annuities. *Cf. NYSALU*, 1994 N.Y. LEXIS 324 at *7 ("[c]learly, the 'incidental powers' clause in Banking Law Section 96(1) does not consist of common words of clear import, and that clause is susceptible to differing interpretation"). At a minimum, it was not clearly unreasonable for the OCC to interpret the "business of banking" as used in Section 24 (Seventh), as being "comprised of all those powers which are recognized incidents or features of that business." OCC Interpretive Letter No. 494, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,195 (Dec. 20,

1989).[3] Thus, there was no basis for the Fifth Circuit to reject the OCC's determination that the express authorization in Section 24 (Seventh) for commercial banks to engage in "all such incidental powers as shall be necessary to carry on the business of banking" includes the power to sell annuities and other financial investment instruments as agents. (*See* NBNC Pet. App. at 38a).

Even if the Fifth Circuit were authorized to examine *de novo* the OCC's interpretation of the "incidental powers" clause—and it was not—the court erred in holding that "conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed 'necessary.'" (NBNC Pet. App. at 14a-15a). This unduly narrow construction of the incidental powers clause — which defines "necessary" as synonymous with "essential" — is contrary to that of other courts of appeals and of the banking regulators charged with interpreting and enforcing the NBA. *See First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 778 (8th Cir.) (collecting cases holding that "the 'incidental powers' of national banks are not limited to activities that are deemed essential to the exercise of express powers"), *cert. denied*, 498 U.S. 972 (1990). For example, the Ninth Circuit has recognized that the incidental powers clause was included in the NBA "to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *cf. SEC* v. *Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 71 (1959) (refusing "to freeze the concepts of 'insurance' or 'annuity' into the mold they fitted when [the Securities, Investment Company and McCarran-Ferguson] Acts were passed" and, thus, holding

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[3] The OCC relied upon Interpretive Letter 494 in determining that national banks may broker fixed-rate annuities. (*See* NBNC Pet. App. at 38a).

that variable annuities are "securities" that must be registered with the SEC).

The Fifth Circuit's crabbed interpretation of the incidental powers clause of the NBA is in stark contrast to that of the New York Court of Appeals in *NYSALU*. The Court of Appeals deferred to state bank regulators in holding unanimously that commercial banks chartered in New York may sell annuities as agents, construing the incidental powers provision of Section 96(1) of the New York Banking Law, the provision on which Section 24 (Seventh) of the NBA was based,[4] to authorize New York-chartered banks to expand their banking services over time to meet evolving business practices and customer needs. *See NYSALU*, 1994 N.Y. LEXIS 324 at *13. The approach of the New York Court of Appeals — which looks to whether an activity is consistent with the economic functions of, and is of a nature historically or customarily performed by, commercial banks — is far more in keeping with Congress' intent in creating a national banking system.

The Fifth Circuit's departure from this approach and result will likely generate substantial confusion and uncertainty as to the nature and extent of the "business of banking" in the United States. Given the exceptional importance of this issue to the commercial banking industry and its customers, the Court should grant certiorari and hold that the OCC reasonably determined that annuities are financial investment instruments and that the brokerage of those instruments is included among the traditional powers of national banks under Section 24 (Seventh) of the NBA.

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[4] *See Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 431 (1st Cir. 1972); Phillip R. Trimble, *The Implied Power of National Banks to Issue Letters of Credit and Accept Bills*, 58 Yale L.J. 713, 719 (1949).

III.

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER NATIONAL BANKS LOCATED OUTSIDE OF SMALL TOWNS MAY SELL "INSURANCE" PRODUCTS THAT ARE INCIDENTAL TO THEIR BANKING BUSINESS.

Because the Fifth Circuit erroneously concluded that annuities are a form of "insurance" (NBNC Pet. App. at 10a), the court was required to decide whether the sale of annuities is covered by Section 92. In rejecting the OCC's determination that Section 92 does not prohibit national banks from brokering annuities, the Fifth Circuit intensified the existing conflict among the courts of appeals over whether Section 92 bars national banks in communities with populations exceeding 5,000 from acting as sales agents for *all* "insurance" products, even when the OCC determines that such sales *are* incidental to the business of banking.

The court below (NBNC Pet. App. at 10a, 13a-17a) and the Second Circuit in *American Land Title Association* v. *Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993), have held that Section 92 impliedly bars national banks from selling annuities and title insurance, respectively, notwithstanding the OCC's determination that the sale of those products is incidental to the business of banking. Both courts applied the erroneous construction of Section 92 first adopted by the Fifth Circuit in *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968), sixteen years before this court's decision in *Chevron*. By contrast, the D.C. Circuit has rejected this erroneous construction of Section 92 and upheld the OCC's determination that national banks may sell credit life insurance as incidental to the business of banking. *See Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1169-70 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *see also Independent Ins. Agents* v. *Federal Reserve*

Bd., 736 F.2d 468, 477 n.6 (8th Cir. 1984) (upholding Federal Reserve's approval of bank holding company's application to engage in credit-related property and casualty insurance, and noting "strong argument" that *Saxon* had "wrongly decided" that Section 92 bars banks from selling insurance).

Section 92 provides that "*[i]n addition* to the powers now vested by law in national banking associations," national banks in small towns may "act as the agent for any fire, life, or other insurance company" in selling insurance policies. (Emphasis added). As the Petitions demonstrate (*see* OCC Pet. at 14-15; NBNC Pet. at 24-25), the language and legislative history of Section 92 support the OCC's (and the D.C. Circuit's) view that Section 92 is a *supplemental* grant of authority providing additional sources of income for national banks located in small towns from the sale of insurance that is *not* incidental to the business of banking. Section 92 does not restrict the power of national banks to conduct "the business of banking."[5] The court below erred in refusing to enforce the OCC's interpretation.

Instead, the Fifth Circuit relied upon the maxim of construction *expressio unius est exclusio alterius* to conclude that Section 24 (Seventh) does not apply here. (*See* NBNC Pet. App. at 15a-16a). However, Section 92 does not address—and, thus, the maxim cannot be invoked to restrict—the powers Section 24 (Seventh) grants to national banks to

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[5] *See Independent Bankers Ass'n* v. *Heimann*, 613 F.2d at 1170 n.18 ("[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies"); *Independent Ins. Agents* v. *Federal Reserve Bd.*, 736 F.2d 477 n.6 ("[t]he legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance").

engage in insurance-related activities that *are* incidental to the business of banking. (*See* NBNC Pet. at 25-26).

The ability of national banks to engage in a wide range of banking activities should not depend upon the fortuity of a bank's location or the venue in which the bank's activities are challenged. Accordingly, this Court should now resolve the important conflict among the courts of appeals over whether Section 92 bars national banks in communities of more than 5,000 persons from selling insurance-related products that are incidental to the business of banking. Although this conflict has previously existed, it is posed for the first time in the context of a judicial decision that could require scores of banks to discontinue existing services involving billions of dollars in revenues. This is a straightforward question of statutory construction requiring determination by this Court to forestall further conflict and uncertainty affecting an important sector of the nation's financial system.

IV.

THE FIFTH CIRCUIT'S FAILURE TO FOLLOW *CHEVRON* THREATENS THE OCC'S EXPERT ADMINISTRATION OF THE NBA AND THE DEVELOPMENT OF BANKING GENERALLY.

This Court should grant certiorari for the additional reason that the Fifth Circuit's rejection of the OCC's determination that national banks may sell annuities, in clear contravention of *Chevron*, has disrupted the regulatory predictability and stability essential to the banking business. The OCC is the federal agency charged with the regulation of national banks and the administration of the NBA. Law and business necessity compel national banks to rely on the OCC's interpretation of the permissible scope of their banking activities.

More generally, banks are subject to a comprehensive scheme of regulation that pervades every aspect of their operations and procedures. Many parts of this scheme are specifically left to implementing regulations of the banking agencies. Other aspects of this scheme, particularly those enacted many years ago, require interpretation and, frequently, reinterpretation to account for changing financial, economic and technological developments.

Since the enactment of the NBA in 1864, there have been enormous changes in the banking and financial services industries, and a growing homogenization in the products offered to consumers. For example, consumers now have a wider range of choices among the money market instruments offered by banks, brokerage firms and mutual funds. If banks could not rely upon OCC regulations and interpretations in response to the evolving demands of the marketplace, they would be unable to meet the changing demands and needs of their customers, and inevitably their competitive position would deteriorate.

If allowed to stand, the decision below would pave the way for other courts to substitute their construction of the NBA for the reasoned interpretations of the OCC, even where the regulator's interpretation is supported by the statute's language and legislative history. Such an approach inevitably would result in piecemeal and inconsistent application of the federal banking laws and would hinder the development of a coherent body of law for the national banking community.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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May 13, 1994

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Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A. and NATIONSBANC SECURITIES, INC.,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN SUPPORT OF PETITIONERS FILED BY *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS, COMMUNITY BANKERS ASSOCIATION OF NEW YORK STATE, FLORIDA BANKERS ASSOCIATION, INDEPENDENT BANKERS ASSOCIATION OF AMERICA, INDEPENDENT BANKERS ASSOCIATION OF TEXAS, KENTUCKY BANKERS ASSOCIATION, MISSISSIPPI BANKERS ASSOCIATION, SAVINGS & COMMUNITY BANKERS OF AMERICA, TEXAS BANKERS ASSOCIATION, and WESTERN INDEPENDENT BANKERS

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MISSISSIPPI BANKERS ASSOCIATION,
SAVINGS & COMMUNITY BANKERS OF AMERICA,
TEXAS BANKERS ASSOCIATION,
and WESTERN INDEPENDENT BANKERS**

Concerned with the broad public policy issues and the specific repercussions to financial institutions engendered by the decision of the court of appeals, *amici curiae* sup-

port the petitioners [1] in urging this Court to grant certiorari. This case presents important issues for consumers, for bank regulators, for all national and many state banks, and for the entire financial services industry. Together with *amici* that are filing separate briefs, *amici* represent virtually every commercial bank in the United States.

Respondent Variable Annuity Life Insurance Co. ("VALIC") is an insurance company seeking to restrain competition in the sale of annuities to consumers. If the decision below is permitted to stand, VALIC—benefitting from the court of appeals' failure to accord any deference to the expertise of the Comptroller of the Currency ("Comptroller") and from two procedural quirks [2]—could accomplish that objective nationwide, constricting the availability of annuities to consumers and causing irreparable injury to the banking industry. *Amici* respectfully join the petitioners in asking this Court to review

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[1] The petitioners in No. 93-1612 are NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc. The petitioners in No. 93-1613 are the United States and the Comptroller of the Currency. Citations to the appendices to the petition of NationsBank in No. 93-1612 are denoted by "App."

Pursuant to Supreme Court Rule 37, *amici* have requested and received consent to file this brief from counsel for petitioners and from counsel for respondent Variable Annuity Life Insurance Co. The original letters of consent to the filing of this brief have been filed with the Clerk of this Court.

[2] The first procedural quirk apparently permits VALIC to compel any national bank wishing to sell annuities to litigate the issue in VALIC's home district and circuit. *See* Petition of NationsBank, at 23 n.22; Petition of the United States, at 22-23.

The second quirk deprived the banking industry of the opportunity to have the issues heard *en banc* by the court of appeals. Even though four circuit judges sharply disagreed with and voted for rehearing *en banc* of the three-judge panel decision, the recusal of nearly half of the active Fifth Circuit judges meant that such consideration was denied. App. 19a n.*. The dissenting judges lamented the court's "serious error" in failing to review the case. App. 28a; *see* Petition of NationsBank, at 9-10; Petition of the United States, at 21-22.

the judgment of the Court of Appeals for the Fifth Circuit.

INTERESTS OF THE *AMICI CURIAE*

This case concerns the statutory authority for national banks to market annuities. The court of appeals fundamentally misconstrued the national banking scheme and reached a conclusion that ignores heretofore unquestioned pronouncements of this Court. In so doing, the court of appeals also improperly reviewed de novo the Comptroller's determination.

Amici include the national association of state banking regulators—the Conference of State Bank Supervisors—and national, regional, and state trade associations for the banking industry representing financial institutions of all sizes and types. The member institutions of *amici* associations are located in every state and the District of Columbia, and in major financial centers as well as in small communities and rural areas.

The *Conference of State Bank Supervisors* (CSBS) is the professional association of state government officials responsible for chartering and regulating more than 10,000 state-chartered banking institutions in the fifty states and in Guam, Puerto Rico, and the Virgin Islands. CSBS joins this brief out of specific concern about the important policy consequences of the court of appeals' decision and the impact of the decision on the supervisory authority of bank regulators over state-chartered banks.

The *amici* associations represent many financial institutions that currently sell annuities. These *amici* and their members are directly and adversely affected by the court of appeals' erroneous decision. The decision—if allowed to stand—will have an immediate and destructive effect upon the substantial and profitable business of bank sales of annuities. Some institutions represented by *amici* have been marketing annuities for nearly a decade, in accordance with long-standing decisions of the Comptroller.

See, e.g., OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985). Moreover, because of the commonplace incorporation by reference of national bank powers into state banking statutes (so-called wild card laws), the disposition of this case will affect the powers of numerous state-chartered banks as well. *Amici* include the following national and state associations whose members have a distinct interest in the outcome of this case:

The *Community Bankers Association of New York State* (CBANYS) is the principal trade association for savings institutions in New York. Its 129 members represent $126 billion in assets and include federal and state-chartered savings banks and savings and loans, and mutual and stock-owned savings and banking institutions.

The *Florida Bankers Association* (FBA) is the principal organization representing commercial banks in Florida. FBA's 321 members comprise 88% of the banks in the state, and these member banks hold 96% of the state's bank deposits.

The *Independent Bankers Association of America* (IBAA) is the only national trade association that exclusively represents the interests of the nation's community banks. The 5800 member institutions of IBAA serve a variety of communities—cities, suburbs and rural areas —in all fifty states and the District of Columbia.

The *Independent Bankers Association of Texas* (IBAT) is a trade association representing approximately 800 independently owned or community banks domiciled in the State of Texas. The IBAT membership includes both national and state-chartered institutions.

The *Kentucky Bankers Association* is a trade association of 300 national and state banks representing over 95% of the banking industry in Kentucky.

The *Mississippi Bankers Association* (MBA) (formally known as the Mississippi Association of Financial Institu-

tions of Deposit, Inc.) is a trade association representing commercial banks in Mississippi. MBA comprises 114 commercial banks, which hold over 99% of the state's commercial banking assets.

Savings & Community Bankers of America (SCBA) is the national trade organization for the savings industry. Its 1900 members include federal and state-chartered institutions, stockholder or mutually-owned, throughout the United States. SCBA serves its members through technical assistance, educational products and programs, publications, meetings, and other activities that enhance the operations of savings institutions. Among other things, SCBA provides information to the officers and directors of its individual members on how to comply with the requirements of federal and state law and regulation.

The *Texas Bankers Association* (TBA) is the principal trade association for the commercial banking industry in Texas. TBA's members include over 900 federal and state-chartered banks within the state. The members include banks of all sizes located throughout Texas, including independent banks as well as members of multistate holding companies. TBA members account for approximately 95% of the deposits in Texas' commercial banking system.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming, as well as American Samoa and Guam. WIB's members account for more than $34 billion in banking assets.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' ERRONEOUS CONSTRUCTION OF FEDERAL LAW WILL SEVERELY CONSTRICT ONGOING BANKING PRACTICES TO THE SERIOUS DETRIMENT OF BANKS AND THEIR CUSTOMERS.

As the four circuit judges dissenting from the denial of rehearing *en banc* noted: "No one can seriously question the importance of this case to the banking industry and to commerce and competition in general." App. 21a. For the banking industry, as the dissent put it, the panel's decision "seriously thwarts competition in a major market, with no indication that that is what Congress intended." App. 20a. The original three-judge panel accomplished this anticompetitive result by circumscribing the ability of banks to participate in the profitable and growing annuities market.

1. The anticompetitive consequences of which the dissent warned are straightforward: the court of appeals' revocation of banks' power to market annuities would leave customers with little choice but to purchase annuities through insurance agents and other non-bank distributors such as respondent VALIC.

Bank customers are the primary beneficiaries of bank annuity sales. The distribution of annuities by and through banks provides a convenient way for consumers to purchase such investment products. Indeed, recent statistics demonstrate that between 75% and 90% of customers purchasing annuities from banks were first-time buyers of these products. ASSOCIATION OF BANKS-IN-INSURANCE, FACT BOOK 7 (1993). By foreclosing bank annuity sales and thus constricting the consumer's opportunity to purchase annuities, the decision below makes the banking public the victim of its error.

Banks' ability to market annuities and similar investment products also benefits the banking system. Fees

generated by bank brokerage of annuities represent an increasingly important source of revenue for banks. Recent statistics provided by Kenneth Kehrer and Associates demonstrate that financial institutions more than tripled their annual annuity sales between 1987 and 1993, and that by 1993 annual annuity sales by financial institutions in the United States totalled *$13.5 billion.* In 1993 banks and thrifts accounted for 21.3% of individual annuity sales.

The sale of annuities by banks poses no risk to the financial security of banks because they act solely as agents for non-bank underwriters of the annuity policies. For the same reason, bank sales of annuities pose no risk to the Federal Deposit Insurance Fund. The Fifth Circuit's ruling curtails this source of revenue, seriously undermining the financial strength and competitiveness of banks, with no evidence that this is what Congress intended, App. 20a, and without appropriate deference to the views of the Comptroller.

The Comptroller's determination that petitioner NationsBank may market annuities is consistent with the procompetitive policies embodied in federal banking law and in our system of enterprise: "Customers will benefit from the increased range of products made available to them by [petitioner NationsBank]." App. 48a (Comptroller's ruling). That determination rests on the Comptroller's critical and expert analysis of the nature of annuities and the relevant provisions of the federal banking laws. App. 37a-48a. In substituting its own views for the reasonable interpretations of the Comptroller, the court of appeals constructed anticompetitive barriers that stifle the ability of banks to participate fully in the rapidly changing financial services marketplace.

2. The panel's decision nominally deals only with the powers of national banks under federal law but will directly affect many state-chartered banks as well. Many states have enacted so-called wild card statutes that em-

power their state-chartered banks to engage in banking activities to the same extent as permissible for national banks. Doyle C. Bartlett, *Playing the Wild Card*, 3 BANK INS. MARKETING 8-9 (1993) (identifying 38 "wild card" states). Accordingly, the court of appeals' limitation upon the power of national banks also limits the powers of banks chartered by many states. This Court should review the Fifth Circuit's faulty conclusion on this important question of federal law.

II. THE COURT OF APPEALS IGNORED CONGRESS' INTENT TO CREATE A FLEXIBLE BANKING SCHEME ADMINISTERED BY THE COMPTROLLER.

In overturning the Comptroller's determination and in interpreting 12 U.S.C. 24 Seventh narrowly, the court of appeals fundamentally misconstrued the adaptable design of the National Bank Act and ignored the central, congressionally assigned role of the Comptroller in administering the national banking laws. The panel's errors in this important area of federal law merit review by this Court.

1. Congress crafted a flexible statutory scheme to govern national banks. "[T]he National Bank Act did not freeze the practices of national banks in their nineteenth century forms," and "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977).

In particular, Section 24 Seventh imbues national banks with "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24 Seventh. The Comptroller determined that banks possess the power to sell annuities pursuant to this "incidental powers" clause. App. 37a-41a. In overturning this determination, the court of appeals ignored the flexibility afforded by the

provision and adopted an interpretation that does violence to the very purpose of the incidental powers clause—to allow the business of banking to evolve to meet changing market and consumer demands.

This flexible character is reinforced by the recent judicial interpretations of an identical provision of New York law that, significantly, is the predecessor of the incidental powers provision of Section 24 Seventh.[3] The interpretation of the New York statute accordingly is instructive as to the meaning of the federal clause.[4] New York's intermediate appellate court recognized that "the incidental powers clause has as its purpose events in futuro," *New York State Ass'n of Life Underwriters v. New York State Dep't of Banking*, 190 A.D.2d 338, 342, 598 N.Y.S.2d 824, 827 (1993), *aff'd*, 83 N.Y.2d 353, 1994 N.Y. LEXIS 324 (1994), and held that the sale of annuities is "an 'incidental power' of the 'business of banking,'" 190 A.D.2d at 344, 598 N.Y.S.2d at 829. The New York Court of Appeals affirmed, stating that "the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service." 1994 N.Y. LEXIS at *10.[5] The incidental powers provision of Section 24 Seventh does not freeze the "business of banking" in time but instead allows "banks to expand their banking services over time consistent with evolving business practices and their

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[3] Symons, *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 689 (1983).

[4] *See* 2B N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 51.01, 51.06 (5th ed. 1992).

[5] The New York rulings were based upon *Curtis v. Leavitt*, 15 N.Y. 9 (1857), which was decided six years before Congress enacted the National Bank Act. Congress doubtless was aware of the purpose of New York's incidental powers clause when it included identical language in the federal statute. *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) ("[W]e are willing to assume that Congress entertained these views when it enacted the National Bank Act.").

customers' needs." 190 A.D.2d at 341, 598 N.Y.S.2d at 827.

The court of appeals' analysis in this case disregards entirely the prospective orientation of the National Bank Act and Section 24 Seventh. The decision below would freeze the business of banking as it eixsted when the banking laws were enacted.[6]

The court of appeals also said that "[e]ven conceding arguendo that the power to sell annuities would be incidental to banking, by no stretch of the imagination can that power be deemed to be '*necessary*.'" App. 15a (emphasis added). This analysis, however, construes the word "necessary" in a manner that consistently has been rejected by federal courts for over two decades. Instead, the courts generally construe an activity to be a permissible form of the business of banking under Section 24 Seventh if the activity is "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972); *see also M & M Leasing Corp.*, 563 F.2d at 1382; *Securities Industry Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). *Cf. American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (finding even the "convenient and useful" test of *Arnold Tours* to be unduly restrictive).

2. Congress empowered the Comptroller to administer this flexible regulatory scheme:

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[6] The court of appeals made a similar error in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968). There the court of appeals looked to the business of banking as it had existed in 1916 to determine whether a national bank could operate an insurance agency under the incidental powers clause of Section 24 Seventh.

> [C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) ("*Clarke v. SIA*") (citing *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)); *see also* 12 U.S.C. 26 (Comptroller's chartering authority), 211(a) (rulemaking authority), 1818 (enforcement authority).

While Congress intended the activities of national banks to develop over time, their evolution was made subject to the supervision of the Comptroller. The Comptroller is expert in this complex area of law and business and has been charged with ensuring the orderly development of the national banking system consistent with sound banking standards. It is this pervasive regulatory structure, administered by the Comptroller, that has allowed the business of banking to evolve and meet the challenges of the contemporary financial services market, though the structure of the National Bank Act has remained essentially unchanged for over a century.

Whether the sale of annuities is an "incidental power" under Section 24 Seventh is in the first instance for the Comptroller to determine. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Clarke v. SIA*, 479 U.S. at 403-04. Ignoring this fundamental principle of administrative law, the panel instead rendered its own interpretation, compounding its error by looking backward instead of forward. By substituting its own construction for that of the Comptroller, the court of appeals ignored the regulatory scheme established by Congress, in derogation of the instructions of this Court in *Chevron* and in *Clarke v. SIA*.

III. THE COURT OF APPEALS MISINTERPRETED SECTION 92 IN CONFLICT WITH THIS COURT'S DECISIONS AND WITH THE TEXT OF THE STATUTE.

The court of appeals held that 12 U.S.C. 92 prohibits national banks located in places with a population exceeding 5000 from selling annuities. App. 6a-17a. To reach this conclusion the panel had to determine (1) that annuities are "insurance," App. 10a-17a, and (2) that notwithstanding the incidental powers clause of Section 24 Seventh, the express *permission* granted by subsequently enacted Section 92 for national banks in small towns to sell "fire, life, or other insurance" constitutes an unspoken *prohibition* upon the sale of *any* type of "insurance" in a larger locality. App. 6a-10a. Both determinations were errors that, as demonstrated above, will injure greatly the public and the banking industry.

1. The court of appeals reached an absolutist determination that "annuities are . . . insurance." App. 10a. To support this unprecedented proclamation, the court of appeals observed that the sale of annuities is regulated under some state insurance laws and quoted a provision of the Internal Revenue Code of 1986—one saying nothing more than that insurance companies sell both life insurance policies and annuity contracts. App. 11a. As to the former basis, this Court long ago made clear that state law does not determine whether annuities are "insurance" for federal law purposes. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959) ("*SEC v. VALIC*"). From the latter basis, the court of appeals generalized, incorrectly, that federal laws "reflect the fact that annuities are an insurance product." App. 11a. This Court has also made clear that in the federal context it is the nature of the particular product under review that determines whether it is "insurance." *SEC v. VALIC*, 359 U.S. at 69; *see John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993) (holding that *each component* of the product

must be examined *separately* to ascertain whether it is insurance).

The court of appeals' decision conflicts with this Court's holding in *SEC v. VALIC.* There, the Court determined that variable annuities are not "insurance" within the meaning of the Securities Act of 1933 and Section 2(b) of the McCarran-Ferguson Act. In so doing, the Court rejected the contention—advanced by the same entity that is the respondent here—that annuities are "insurance" for the purposes of these two federal laws (albeit securities and insurance laws rather than banking laws).

Ignoring the Court's holding in *SEC v. VALIC*, the court of appeals relied upon Justice Brennan's tepid concurring observation that " 'the granting of annuities has been *considered* part of the business of life insurance.' " App. 10a (quoting *SEC v. VALIC*, 359 U.S. at 81 (Brennan, J., concurring) (emphasis added)). The court of appeals, however, overlooked the fact that Justice Brennan *concurred* with the Court's conclusion that variable annuities are not "insurance." Indeed, only two sentences after the language quoted by the court of appeals, Justice Brennan stated that the administration of variable annuities "involves a very substantial and in fact predominant element of the business of an investment company, . . . in any way totally foreign to the business of a traditional life insurance and annuity company." *SEC v. VALIC*, 359 U.S. at 81.

This Court reaffirmed the vitality of *SEC v. VALIC* only last December. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). In analyzing whether the contract at issue in *John Hancock* was a "guaranteed benefit policy" exempt from certain aspects of the Employee Retirement Income Security Act, the Court looked to its "decisions construing the insurance policy exemption [of] the Securities Act of 1933." *Id.* at 527. In conducting this analysis the Court examined each

component of the contract to determine whether that component allocated risk to the insurer.

John Hancock and *SEC v. VALIC* demonstrate the error of this aspect of the decision below. *SEC v. VALIC* made clear that application of the term "insurance" for federal securities law purposes requires scrutiny of a product's risk allocation. *John Hancock* underscored this point by instructing that the risk allocation for *each component* of a contract must be examined separately. The Fifth Circuit undertook no such analysis, relying instead on inapposite definitions in Black's Law Dictionary and a single citation to the Internal Revenue Code to support its conclusion that annuities are "insurance" for all purposes.[7] That conclusion cannot be squared with the teachings of *SEC v. VALIC* or *John Hancock*.

2. The court of appeals further erred by determining that because Section 92 *added* to the existing authority of national banks in small towns, Section 92 perforce must have *detracted* from the authority of banks located elsewhere. App. 3a, 6a-7a. This error perpetuates the misinterpretation of Section 92 by a prior Fifth Circuit decision, *Saxon v. Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968).

Whether Section 92 somehow impliedly restricts the power of national banks in towns of more than 5000

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[7] Indeed, as the dissenters from the denial of rehearing *en banc* noted, the panel ignored not only this Court's rulings but also Fifth Circuit precedent that annuities are not insurance for purposes of state law. App. 27a. *In re Newman*, 993 F.2d 90 (5th Cir. 1993), held that an annuity contract is a "general intangible" for purposes of Texas commercial law. Significantly, "insurance" is expressly exempted by Texas law from the definition of general intangibles. If annuities were "insurance," they could not be "general intangibles." *See also In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987) ("an annuity is essentially a form of investment") (quoting *In re Howerton*, 21 B.R. 621, 623 (Bankr. N.D. Tex. 1982)). The inability of the court of appeals to resolve this conflict *en banc* further demonstrates the need for resolution by this Court.

residents to sell insurance—despite the language of Section 92 that grants powers "[*i*]*n addition* to the powers now vested by law" [8]—is itself an important federal question meriting resolution by this Court.[9] The courts of appeals have been unable to agree on this issue. The court of appeals here relied upon the assertedly "plain language" of Section 92. App. 3a; *accord Saxon*, 399 F.2d at 1013-16. The Eighth Circuit has taken a contrary view: "There is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance." *Independent Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 736 F.2d 468, 477 n.6 (8th Cir. 1984). So has the D.C. Circuit: "By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 n.18 (D.C. Cir. 1979) (authorizing sale of credit life insurance). This important conflict among the circuits, which is underscored by the court of appeals' decision, merits resolution by this Court.

Contrary to the position of the Fifth Circuit here and in *Saxon*, Section 92 does not address the authority of banks located *outside* of small towns to act as agents for insurance companies. Indeed, as the conflict among the circuits demonstrates, the language of Section 92 is anything but plain in this respect. This Court should grant certiorari to consider this important issue as well as the issue of the scope of Section 24 Seventh.

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[8] "In addition to the powers now vested by law in national banking associations organized under the laws of the United States any association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company." 12 U.S.C. 92.

[9] See Question Presented, No. 2, Petition of NationsBank at i.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petitions for writ of certiorari.

Respectfully submitted,

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Nos. 93-1612, 93-1613

In The

Supreme Court of the United States

October Term, 1994

NationsBank of North Carolina, N.A. and
NationsBanc Securities, Inc.,

Petitioners,

v.

Variable Annuity Life Insurance Co.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANK SECURITIES, INC.

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the *Chevron* standard when it engaged in a *de novo* analysis and failed to defer to the Comptroller's reasonable construction of 12 U.S.C. §§ 24(7) and 92 and his determination that annuities do not constitute "insurance" for purposes of 12 U.S.C. § 92.

2. Whether 12 U.S.C. § 92, which provides that, "in addition to" their other powers, national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company," impliedly bars national banks in more populous places from brokering annuities, even though the Comptroller has determined such activity to be part of the "business of banking" or "incidental" thereto under 12 U.S.C. § 24(7).

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Nos. 93-1612, 93-1613

NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANK SECURITIES, INC.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-17a)[1] is reported at 998 F.2d 1295. The opinion of the United States Court of

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[1] On June 27, 1994, this Court granted petitioners' motion to dispense with the requirement of a joint appendix, since relevant portions of the record already were reproduced in the appendix to NationsBank's certiorari petition. References to that appendix are designated "Pet. App. ___ " throughout this brief.

Appeals for the Fifth Circuit denying rehearing and rehearing *en banc*, and the opinion dissenting therefrom (Pet. App. 18a-28a) are reported at 13 F.3d 833. The opinion of the United States District Court for the Southern District of Texas (Pet. App. 29a-34a) is reported at 786 F. Supp. 639. The approval of the Office of the Comptroller of the Currency (the "Comptroller") (Pet. App. 35a-48a), dated March 21, 1990, at issue here, is unreported (the "Comptroller's Approval").[2]

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. Petitions for rehearing and suggestions for rehearing *en banc* were denied on January 13, 1994. Petitions for certiorari were filed on April 13, 1994, and were granted on June 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 12 U.S.C. § 24 (section 5136 of the Revised Statutes of 1878) provides, in pertinent part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

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[2] The Comptroller's Approval, in turn, references (Pet. App. 35a) Interpretive Letter No. 499 of the Chief Counsel of the Comptroller, dated February 12, 1990. *See* OCC Ltr. No. 499, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) 83,090 (Feb. 12, 1990) ("Chief Counsel's Letter"). The Chief Counsel's Letter is attached as an appendix hereto. References to that appendix are designated "App. ___" throughout this brief.

* * * *

> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account . . . .

2. 12 U.S.C. § 92 (originally enacted as Act of September 7, 1916, ch. 461, 39 Stat. 753, and amended by Act of October 15, 1982, Pub. L. No. 97-320, 403(b), 96 Stat. 1511) provides, in pertinent part:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may

> receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent . . . .

STATEMENT OF THE CASE

This case presents a question of substantial importance to national banks—whether they are permitted under federal banking laws to sell as agent (*i.e.*, broker) fixed and variable annuity contracts to their customers. The question has arisen in a challenge to the Comptroller's approval of the request of NationsBank of North Carolina, N.A. ("NationsBank") to have its wholly-owned brokerage operating subsidiary, NationsBanc Securities, Inc. ("NSI"),[3] broker fixed and variable annuity contracts issued by annuity issuers unaffiliated with NationsBank or NSI.

A fixed annuity is a contract in which an issuer agrees, commencing at a specified time (the "maturity date"), to make periodic payments to the purchaser or other beneficiary for the life of the purchaser (or another party, such as the surviving spouse of the purchaser) or for a fixed term, in return for one or more payments made during a "pay-in" period. In a pure fixed annuity, the amount of the periodic payments are specified in the contract or based upon a set interest rate. In effect, a fixed annuity is a debt obligation of the issuer. Most modern fixed annuities, including those at issue here, include a discretionary excess interest feature whereby the issuer has discretion to pay additional amounts beyond the contractually-set minimum payments. *See generally* Pet. App. 35a-36a & n.1.

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[3] Petitioners have undergone a change of name during the course of this case. NationsBank was previously NCNB National Bank of North Carolina and NSI was previously NCNB Securities, Inc. NationsBank Corporation is the parent company of NationsBank. NationsBank Community Development Corporation and NationsBank Housing Fund Investment Corporation are partially owned subsidiaries of NationsBank.

In a variable annuity, the payments are segregated and invested in a pooled investment vehicle selected by the annuity purchaser. The value of a variable annuity contract at the maturity date is dependent upon the performance of the investment pool selected by the purchaser, although there sometimes is a minimum performance return guaranteed under the contract. Upon the maturity date, a variable annuity can provide various payment options, including level, variable, and lump sum payments, or a combination thereof. Pet. App. 35a-36a; *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 68-72 & n.13 (1959) ("*SEC v. VALIC*").[4]

Fixed and variable annuities have become popular retail investment vehicles used by an increasing number of individuals to pursue their investment and retirement goals. Annuities, as investment options, compete directly with a broad range of other retail investment products, such as taxable and tax-free mutual funds, certificates of deposit and equity and fixed income securities. Because annuities possess certain tax-deferral characteristics, they can be an especially attractive investment alternative for particular investors. Annuities are widely marketed to the public based upon their tax-deferred investment attributes and not on the basis of any risk-insuring characteristics.

Currently, securities brokerage firms, insurance companies and their agents, insurance brokers, and numerous depository institutions (directly or through subsidiaries and

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[4] Variable annuity contracts are registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, *et seq.* ("Investment Company Act"), as a type of investment company, similar in substance to mutual funds. These annuity contracts also must be registered as securities under the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* ("Securities Act"). *See SEC v. VALIC*, 359 U.S. at 67-68. In addition, at least some fixed annuities also are required to be registered as securities under the Securities Act. This Court has stated that "the term 'security' as defined in the Securities Act is broad enough to include *any* 'annuity' contract." *Ibid.* (footnote omitted) (emphasis added).

affiliates), including federally-chartered thrift institutions, many state-chartered banks and state-chartered thrift institutions, and credit unions, are authorized to sell fixed and variable annuities as investment alternatives. For example, the New York Court of Appeals has recently affirmed the determination of the New York Banking Department that the brokering of annuities by New York state-chartered banks is an "incidental power" of the "business of banking" under New York banking law. *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353, 360, 632 N.E.2d 876, 879 (N.Y. 1994). Accordingly, a substantial number of the depository institutions and other financial services providers with which national banks directly compete have the power to sell fixed and variable annuities.

A. The Comptroller's Approval

In August 1989, NationsBank sought approval from the Comptroller for NSI to engage in the sale, as agent, of both fixed and variable annuity contracts solely upon the order and for the account of customers and without recourse.[5] NSI proposed to offer annuities issued by a number of companies unaffiliated with NSI or NationsBank. The annuities to be offered varied as to whether they required single or multiple payments, and whether payments would accumulate solely in a variable account, a fixed account, or a combination of fixed and variable accounts. All fixed annuities to be offered would have some form of an excess interest rate feature.

On March 21, 1990, the Comptroller approved NationsBank's request. In doing so, the Comptroller relied, in part, on the "incidental powers" of national banks to

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[5] National banks, under applicable Comptroller regulations, may employ operating subsidiaries to engage in activities permissible for their national bank parents and "which are a part of or incidental to the business of banking." 12 C.F.R. § 5.34(c).

buy and sell a broad range of financial investment instruments for their customers under 12 U.S.C. § 24 Seventh (hereinafter "section 24 Seventh") of the National Bank Act. Pet. App. 43a. Based on the traditional role of national banks as financial intermediaries and the close functional similarity between annuities and other financial investment instruments which national banks are authorized to sell, the Comptroller concluded that fixed and variable annuities could be lawfully sold, as agent, by a national bank's operating subsidiary (as well as the national bank itself). Pet. App. 37a-41a.

The Comptroller also stated that, to the extent that the annuity contracts were securities for purposes of the Glass-Steagall Act,[6] the brokerage of the annuities also would be authorized by the express securities brokerage power for national banks set forth in that act. Pet. App. 37a.[7]

The Comptroller further concluded that 12 U.S.C. § 92 ("section 92"), which permits national banks to act as insurance agents in towns with 5,000 or fewer inhabitants, does not limit banking powers under section 24 Seventh. Consistent with the view of two courts of appeals, the Comptroller rejected the Fifth Circuit's interpretive approach set forth in *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968) ("*Saxon*"). Rather, the Comptroller found that section 92 was merely a source of additional power, not a limitation on any powers that national banks otherwise possessed. Pet. App. 42a.

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[6] Act of June 16, 1933, ch. 89, 48 Stat. 184 (codified at 12 U.S.C. § 24 Seventh).

[7] In 1985, the Comptroller's staff had issued interpretive guidance which confirmed that national banks had the authority to broker variable annuities under section 16 of the Glass-Steagall Act. *See* OCC Ltr. No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,501, at 77,773 (Apr. 4, 1985) ("OCC Ltr. 331"). Neither VALIC nor any other annuity issuer ever challenged this published position until this case.

Moreover, the Comptroller concluded that even assuming that the interpretive approach in *Saxon* were valid, it would not preclude the brokering of annuities because annuities are not "insurance" within the meaning of section 92 since they "lack the basic insurance characteristic of indemnification against risk." Pet. App. 47a. As the Comptroller observed, "[a]lthough annuities often share with insurance the need for actuarial calculations, they are primarily a vehicle for investment, not indemnification." Pet. App. 45a. Finally, the Comptroller concluded that, even if annuities were deemed to be "insurance" under section 92, they were a specialized insurance-related product, such as credit-related insurance, and thus are not prohibited by section 92. Pet. App. 43a.

B. The Opinion of the District Court

In September 1990, respondent the Variable Annuity Life Insurance Co. ("VALIC") and various insurance industry trade groups filed suit in the United States District Court for the Western District of Texas challenging the Comptroller's Approval. The district court (Walter S. Smith, J.) dismissed certain plaintiffs for lack of standing and, based upon improper venue, ordered a transfer of the remaining parties to the District Court for the District of Columbia.[8] The plaintiffs then filed voluntary dismissals of the case, and VALIC alone refiled an essentially identical action in the Southern District of Texas in April 1991.[9] After limited discovery, the parties filed cross-motions for summary judgment.

The district court (Kenneth M. Hoyt, J.), adhering to this Court's seminal decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), which it found governed its review of

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[8] The prior district court decision is reported at 761 F. Supp. 1285.

[9] The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1337 and 1361.

the Comptroller's Approval, rejected VALIC's challenge and upheld the Comptroller's Approval. Pet. App. 34a. The district court stated that the "initial inquiry under *Chevron* is whether Congress has directly addressed the specific question at issue." Pet. App. 32a. The district court, on the record before it, concluded that Congress had not specifically addressed the issue of whether national banks are authorized to broker annuity contracts. *Ibid.*

The district court then proceeded to the second step of the *Chevron* analysis: Whether the Comptroller's interpretation of the National Bank Act was reasonable and, thus, entitled to deference. Relying upon the plain language of section 92 and its legislative history, both of which show that section 92 "was proposed to provide an additional source of revenue for national banks located in small towns and not to protect the markets from competing insurance agents," Pet. App. 33a, the district court concluded that the Comptroller's Approval constituted a "permissible construction" of section 92, which is "all that is required in order to secure this Court's deference" under *Chevron*. Pet. App. 34a.

The district court also found that section 92 "is silent with respect to defining the term 'insurance.'" Pet. App. 33a. "[T]his silence, coupled with the express delegation of rulemaking authority to the Comptroller, suggests that Congress explicitly 'left a gap for the [Comptroller] to fill.'" Pet. App. 33a (quoting *Chevron*, 467 U.S. at 843). The district court concluded that the Comptroller had not acted unreasonably in determining "that annuities are primarily financial investment instruments, not insurance," given that annuities lack fundamental insurance characteristics. *Ibid.* The district court further found that the "Comptroller's determination that annuities are a specialized product and not a 'broad form' of insurance to which *Saxon* applied, is reasonable." Pet. App. 34a.

C. The Opinion of the Court of Appeals

On appeal, a panel of the U.S. Court of Appeals for the Fifth Circuit (Goldberg, Jolly, Wiener, JJ.) reversed. Relying chiefly on the maxim of "*expressio unius est exclusio alterius*," the court of appeals first concluded that section 92 "plain[ly]" prohibits national banks from selling insurance products in towns with populations exceeding 5,000. Pet. App. 3a.[10] The court of appeals also held that the district court erroneously deferred to the Comptroller's interpretation of section 92. Deference, it held, was "not appropriate" under *Chevron* where, as in section 92, "the intent of Congress is clear" and would be "frustrate[d]" by deferring to the Comptroller. Pet. App. 9a.

With respect to the issue of whether annuities constitute "insurance," the court of appeals "disagreed" with the Comptroller, stating that "annuities are an insurance product, both historically and functionally." Pet. App. 10a. The court of appeals' conclusion was based primarily on the fact that annuities are regulated, at least in part, under state "insurance" laws and on a provision of the Internal Revenue Code of 1986 defining a "life insurance company" as a company "'issuing life insurance and annuity contracts.'" Pet. App. 11a (quoting 26 U.S.C. § 816(a)).

The court of appeals also refused to defer to the Comptroller's alternative reasoning that, even if *Saxon* were

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[10] In doing so, the court of appeals applied the interpretive approach used in *Saxon*. The court of appeals recognized that the Comptroller disagreed with *Saxon* and had relied upon two subsequent contrary court of appeals decisions, *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468 (8th Cir. 1984) and *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"). The court of appeals rejected these two decisions because, in its view, they "discuss Saxon only in dicta." Pet. App. 8a.

applicable, the present case was distinguishable on the basis that section 92 does not apply to "specialized" insurance-related products like annuities, but only to general types of insurance. Instead, the court of appeals found that section 92 applies to "any . . . insurance company" and to "general" forms of insurance. Pet. App. 13a.

Moreover, the court of appeals rejected the Comptroller's conclusion that national banks can sell annuities as an "incidental power" under section 24 Seventh. It held that the sale of annuities cannot be deemed "necessary" to the "business of banking" by any "stretch of the imagination," without citing any authority construing section 24 Seventh to support its holding. Pet. App. 15a. The court of appeals further held that the "specific" limits on insurance activities in section 92 control over the "general" grant of power in section 24 Seventh. The court of appeals totally ignored the express statutory authority of the Glass-Steagall Act as a separate basis to support the brokering of at least certain types of annuities by national banks.

D. The Opinion of the Court of Appeals Denying Rehearing

After the panel's ruling, NationsBank and NSI, together with the Comptroller, submitted petitions for rehearing and suggestions for rehearing *en banc*, which were denied on January 13, 1994. Of the thirteen active judges, six were disqualified from participating in the case, leaving only a bare majority of seven judges capable of rendering a decision.[11] Of the seven remaining judges, a majority of four judges issued a dissent strongly disagreeing with the prior disposition by the panel. Pet. App. 20a. They opined that, in light of the recusal situation, "it is not possible to discern the views of a substantial majority of the active judges . ... . " *Ibid.*

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[11] *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a).

The dissenting judges stated that the panel "badly erred" in adopting a view that contravened *Chevron*. *Ibid.* They observed that section 92 "nowhere defines 'insurance'"; accordingly, the panel was obliged to take the second step of the *Chevron* analysis, which it refused to do. Pet. App. 24a. Under the second step of *Chevron*, the dissent concluded that the panel should have "le[ft] it to the Comptroller to arrive at a reasonable definition, insofar as it relates to the industry within his jurisdiction, namely, banking." *Ibid.* Finding substantial case authority to support the Comptroller's Approval, much of which conflicts with and was not addressed in the panel's decision, the dissent concluded that the panel should have deferred to the Comptroller's reasonable construction of the applicable banking laws and found that national banks (and their operating subsidiaries) have the authority to sell, on an agency basis, both fixed and variable annuities. Pet. App. 27a-28a.

SUMMARY OF ARGUMENT

In rejecting the Comptroller's determination that national banks are empowered by the federal banking laws to broker fixed and variable annuities, the court of appeals violated fundamental principles of administrative law that limit a court's role in reviewing agency constructions of statutes. These principles, which are described in *Chevron* and its progeny, require courts to defer to reasonable agency constructions where, as here, Congress has not spoken to the precise question at issue. The question in this case, therefore, is whether, under *Chevron*, the Comptroller's construction of the various statutory provisions relevant here—the incidental powers clause of section 24 Seventh, section 92, and the Glass-Steagall Act—were reasonable and consistent with the structure and purpose of the National Bank Act. The answer to this question is an overwhelming yes.

First, the Comptroller reasonably concluded that national banks were empowered to broker fixed annuities based upon the incidental powers clause of section 24 Seventh, which authorizes national banks to engage in "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. The Comptroller looked to the longstanding role of banks as financial intermediaries and determined that the brokering of fixed annuities was consistent with that function. He further determined that annuities functionally resembled other investment products that national banks had long been empowered to sell and that annuities were, in fact, treated as investment products in the marketplace. Accordingly, he concluded that the sale, as agent, of annuities by national banks is authorized under section 24 Seventh.

The court of appeals erred in holding that the power to sell annuities can "by no stretch of the imagination" be deemed "necessary." The court of appeals' unduly narrow construction of the word "necessary" mistakenly treats "necessary" as synonymous with "essential." Such a construction is contrary to precedent of this Court and numerous courts of appeals, which instead have adopted a functional and dynamic mode of analysis in determining the scope of permissible national bank activities under section 24 Seventh.

Second, since at least some types of annuities are securities within the meaning of the Glass-Steagall Act, national banks also possess an express banking power to broker annuities. In a prior interpretive letter, the Comptroller's office had confirmed that national banks had the authority to broker variable annuities. That interpretation was reasonably premised upon the "functional resemblance" of variable annuities to mutual funds (which are Glass-Steagall Act securities) and upon the fact that variable annuities were "securities" under the Securities Act.

For the same reasons, at least some fixed annuities also are Glass-Steagall securities. Because national banks have express annuities brokerage authority and because it has never been contended by the respondent that section 92 is a limitation upon an express banking power, an alternative basis for reversal is that at least some annuities are Glass-Steagall securities which national banks have the express authority to broker.

Finally, the court of appeals erred in interpreting section 92 as an implied limitation on the authority of national banks to market annuities as general insurance agents. By its terms, as the Comptroller properly found, section 92 is a supplemental grant of authority providing national banks in small towns with additional sources of income from the sale of "insurance" that is not incidental to the business of banking. It does not in any way restrict the power of national banks to engage in the brokering of annuities as part of the "business of banking" under section 24 Seventh. The court of appeals' reliance on the *expressio unius* rule of construction to reach its flawed interpretation of section 92 is not only at odds with proper application of the *Chevron*, but inconsistent with other rules of construction that require statutory provisions to be construed harmoniously.

Moreover, as the Comptroller also found, annuities are not "insurance" within the meaning of section 92. In so finding, the Comptroller analyzed and contrasted the structure and features of annuities and traditional insurance products and concluded, on the basis of "the great weight of authority," that annuities lack basic insurance characteristics. Further, even if annuities somehow could be deemed to be "insurance" in the broadest sense of the word, the Comptroller concluded that they were at most a specialized insurance-related product that does not fall within the general prohibition of section 92. Under the maxim of *ejusdem generis*, section 92 only extends to the sale of broad forms of insurance. It does not extend to

more specialized insurance-related products that are functionally equivalent to many investment products, the sale of which is authorized for national banks and their operating subsidiaries.

ARGUMENT

I. THE COURT OF APPEALS CONTRAVENED THE *CHEVRON* DOCTRINE IN REJECTING THE COMPTROLLER'S REASONABLE CONSTRUCTION OF SECTION 24 SEVENTH AND SECTION 92.

A. The *Chevron* Doctrine Requires Deference to the Comptroller's Reasonable Construction of the Federal Banking Laws Which He Is Charged with Administering.

There is no dispute that the Comptroller's construction of section 24 Seventh and section 92 is at the heart of this case. The proper role of a court reviewing an agency's construction of a statute which it administers was unambiguously delineated by this Court in *Chevron*, a decision which "has established itself as one of the very few defining cases in the last twenty years of American public law." Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2075 (1990).

Under *Chevron*, a court must first consider "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is "silent or ambiguous," the question for the court is then whether the agency's decision "is based on a permissible construction of the statute." *Id.* at 843. In making that determination, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Pro-

vided that the agency's construction is "'rational and consistent with the statute,'" it must be upheld as "permissible." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. United Food & Commercial Workers Local 23*, 484 U.S. 112, 123 (1987)).

Deference is particularly compelling where, as here, the regulatory scheme is "complex and highly technical" and where the issues in question "require significant expertise, and entail the exercise of judgment grounded in policy concerns." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *see also Chevron*, 467 U.S. at 865; *Independent Bankers Ass'n v. Clarke*, 917 F.2d 1126, 1129 (8th Cir. 1990) (the "regulatory and competitive [banking] environment is especially suited to the expert judgment of regulators").

Applying *Chevron*, in the present case, there can be no question that Congress "has [not] directly spoken" to the issues of whether annuities can be sold under section 24 Seventh or whether annuities are "insurance" within the meaning of section 92. The term "insurance" is nowhere defined, and indeed the term "annuities" does not appear, in either of these sections or their respective legislative histories. There is, therefore, nothing indicating Congress' intent—much less the clear Congressional intent required by *Chevron*—that annuities cannot be sold by national banks under the federal banking laws. Congress simply has never addressed this "precise question."

In these circumstances, under *Chevron*, the court of appeals wrongly reversed the district court and failed to defer to the reasonable interpretations of the Comptroller. As is shown in Sections II and III below, the court of appeals refused to accord the Comptroller the level of deference required by this Court's teachings. In fact, the court of appeals accorded the Comptroller no deference at all in this matter. While paying lip-service to *Chevron*, the court instead did precisely what *Chevron* forbids—it in-

appropriately engaged in a *de novo* analysis and "substitute[d] its own construction of [sections 24 Seventh and 92] for a reasonable interpretation made by [the Comptroller]," the expert regulator. *Chevron*, 467 U.S. at 844.

B. The Failure to Grant Deference to the Comptroller's Reasonable Construction of the Federal Banking Laws at Issue Here Undermines the Critical Role Vested In the Comptroller by Congress.

By failing to grant the Comptroller's interpretations any measure of real deference, the court of appeals undermined the essential role of the Comptroller as the primary regulator of national banks. The Comptroller is specifically charged by Congress with the regulation of national banks and the interpretation and enforcement of the National Bank Act and the Glass-Steagall Act. *See* 12 U.S.C. § 1, *et seq.*; *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971). The Comptroller's interpretations and rulings govern, in minute detail, many facets of a national bank's operations, including the permissible scope of banking activities. *See Heimann*, 613 F.2d at 1168 ("National banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized . . . .") The judicial invalidation of entirely reasonable and appropriate Comptroller determinations, such as is the case here, vitiates the critical regulatory authority Congress intended the Comptroller to possess. It also creates substantial uncertainty as to whether the national banks can safely rely on the Comptroller's determinations, no matter how reasonably based. These elements are essential ingredients for an orderly and effective national banking system to exist.

Since the enactment of the National Bank Act over 130 years ago, there have been massive changes in the business of banking and in the products and services offered to

consumers by providers of retail financial services, such as banks. With respect to national banks, these changes have been accommodated primarily by evolving administrative interpretations based upon statutory language, which has changed relatively little over the years. Thus, although the statutory provisions governing national banks' powers have remained largely static since the enactment of the National Bank Act, this Court has considered and upheld administrative determinations by the Comptroller and other banking agencies permitting new and expanded activities not explicitly granted by Congress. *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. at 390-91 (the offering by a national bank's operating subsidiary of discount brokerage services other than at the bank's branch offices); *Board of Governors v. Investment Co. Inst.*, 450 U.S. 46, 49 (1981) (the provision by a bank holding company or its nonbanking subsidiary of investment advisory services to a closed-end investment company).

If national banks could not rely upon such regulatory interpretations they would be unable to respond to the changing demands and needs of their customers and their competitive position vis-a-vis other financial services providers would quickly erode. Such an anomalous result would be clearly contrary to the intent of Congress and would eviscerate the regulatory discretion which Congress wanted the Comptroller to have in a dynamic financial services marketplace.

II. NATIONAL BANKS ARE EMPOWERED BY THE INCIDENTAL POWERS CLAUSE OF THE NATIONAL BANK ACT AND BY THE GLASS-STEAGALL ACT TO SELL FIXED AND VARIABLE ANNUITIES TO THEIR CUSTOMERS.

A. The Comptroller's Conclusion that the Incidental Powers Clause Permits the Brokerage of Fixed Annuities Was Supported by a Functional Approach to the Powers of National Banks and the Structure and Features of Annuity Contracts.

The Comptroller's Approval found that national banks, and their operating subsidiaries, have the authority to sell fixed annuities, as agent, based upon the provision in the National Bank Act granting "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. In construing the National Bank Act's "incidental powers" clause to encompass the brokerage of fixed annuities, the Comptroller found two different bases to support his determination.

First, the Comptroller commenced his analysis by noting that national banks' "traditional role as financial intermediaries [required that they] have broad powers to buy and sell financial investment instruments as agent for customers." Pet. App. 38a. The Comptroller observed that national banks have long engaged in the brokerage of securities for their customers, a power expressly confirmed by Congress in 1933 in the Glass-Steagall Act. *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207, 215 (1984); *Block v. Pennsylvania Exch. Bank*, 253 N.Y. 227, 232, 170 N.E. 900, 901-02 (1930) (securities brokerage by banks is so widespread that "it may be the subject of judicial notice") (Cardozo, CJ). However, the power to broker financial investment products has not been limited to traditional securities products, but has been found by the Comptroller to include a wide variety of financial investment products, including equity interests in real estate,

various types of options, agricultural and metals futures, and various types of financial futures.[12]

Consistent with the analysis underlying these precedents, the Comptroller concluded that, in the current retail investments marketplace, fixed annuities "are primarily financial investments." Pet. App. 38a. Annuities are widely considered by issuers, agents and consumers to be investment products comparable to many other investment products sold by retail financial service providers. The Comptroller cited numerous supporting authorities, including two instructive decisions of this Court,[13] that found that an annuity was predominantly an investment product and not a traditional insurance product indemnifying against a risk of loss. *Ibid.*

Second, using a functional analysis, the Comptroller found a "close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent." Pet. App. 39a. Specifically, the Comptroller found a strong functional similarity between fixed annuities and variable annuities, debt instruments, and certificates of deposit, each of which is a product that national banks have the power to sell to their customers. Pet. App. 39a-41a. "The financial marketplace

[12] OCC Ltr. No. 271, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,435, at 77,577 (Sept. 21, 1983) (equity interests in real estate); OCC Ltr. No. 356, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,526, at 77,818 (Jan. 7, 1986) (agricultural and metals futures used for hedging); OCC Ltr. No. 357, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,527, at 77,819 (Feb. 26, 1986) (options on financial instruments and on financial futures); OCC Ltr. No. 365, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,535, at 77,8332 (Aug. 11, 1986) (financial futures); OCC Ltr. No. 494, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,203 (Dec. 20, 1989) (agricultural, oil, and metals futures and options).

[13] *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207-08 (1967); *Helvering v. Le Gierse*, 312 U.S. 531, 542 (1941).

provides many examples of instruments that, like fixed annuities, pay the investor a fixed stream of income over time in return for an initial investment." Pet. App. 41a.

B. The Comptroller's Construction of the Incidental Powers Clause Was Based upon a Considered Analysis and a Rational Finding that Annuities Are Financial Investment Products.

The court of appeals decision ignored the Comptroller's construction of the incidental powers clause, other than the following lone sentence: "Even conceding arguendo that the power to sell annuities would be incidental to banking, by no stretch of the imagination can that power be deemed 'necessary.'" Pet. App. 15a. The court of appeals instead relied primarily upon the argument that the more "specific" provisions of section 92 control over the more "general grant of power" contained in section 24 Seventh, an argument which, as shown below, is seriously flawed. *See infra* at 37-40.

The cursory treatment that the court of appeals gave to the Comptroller's construction of the incidental powers clause makes it difficult to ascertain the precise basis for the court of appeals' conclusion. It appears that the court construed the word "necessary" to mean that a power must be "absolutely essential" or "indispensable" to the business of banking in order for it to be permissible.

This construction is inconsistent with this Court's interpretation of "necessary" in a variety of other contexts. Generally, this Court has not construed "necessary" to mean "absolutely necessary" or "indispensable," but rather to mean "appropriate" or "reasonably conducive to the end to be accomplished." *See Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944) (in interpreting a provision of the Fair Labor Standards Act of 1938, the Court said that "the word 'necessary' . . . has always been recognized as a word to be harmonized with its context") (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 414 (1819));

Welch v. Helvering, 290 U.S. 111, 113 (1933) (in determining the meaning of "ordinary and necessary expenses" in carrying on a business, "necessary" construed to mean "appropriate and helpful").

Indeed, this Court has construed the "necessary and proper" clause of Article I, section 8, clause 18 of the Constitution, as "not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it." *Legal Tender Case*, 110 U.S. 421, 440 (1884). *See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 413-15 (necessary "frequently imports no more than that one thing is convenient, or useful, or essential to another."). *See also infra* at 26-28.

In any event, the argument with respect to "necessity" is misdirected, since the legitimate issue is whether the Comptroller acted permissibly under *Chevron*. The Comptroller can hardly be questioned as to the reasonableness of his determination that the brokering of annuities is "incidental" to the business of banking. The Comptroller, first, looked to the role of banks as financial intermediaries and determined that brokering fixed annuities was consistent with that role. The Comptroller, then, closely analyzed the modern structure and usage of fixed annuity contracts and found that they bore a close functional resemblance to other investment products that national banks have long been permitted to sell to their customers. This is exactly the type of expert regulatory judgment the Comptroller is authorized and expected to make by Congress.

The analytical approach employed by the Comptroller is both reasonable and consistent with the overall design and purpose of the National Bank Act. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) (in construing stat-

ute, court must look to "design of the statute as a whole and to its object and policy"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Independent Bankers Ass'n v. Clarke*, 917 F.2d 1126 (8th Cir. 1990) (Arnold, J.) (upholding Comptroller's functional definition of the term "State bank"). In the *Independent Bankers* case, for example, the Eighth Circuit upheld the Comptroller's conclusion that savings and loan institutions fall within the term "State banks" in the McFadden Act. There, as here, the Comptroller's conclusion was based on a "practical" and "functional" approach to the term "State banks." *Independent Bankers*, 917 F.2d at 1129. The Comptroller had found that savings and loan institutions engage in virtually the same financial activities as commercial banks. *Id.* at 1128. The Eighth Circuit noted that "everyone with a nodding acquaintance with the modern development of the financial industry" recognizes that former bright-line distinctions had "blurred." *Ibid.* Given "the realities of banking in the nineties," the court held that the Comptroller's functional approach was "well within the bounds of reason." *Id.* at 1129.

In the courts below, VALIC's criticism of the Comptroller was not with his analytical approach in construing the incidental powers clause, but with the Comptroller's factual finding that a fixed annuity was functionally an investment product. In this regard, the Comptroller was certainly entitled to look beneath the surface qualities of annuities to their underlying substantive characteristics, including how they are treated in today's financial services marketplace. *Cf. SEC v. United Benefit Life Ins. Co.*, 387 U.S. at 211 (quoting *SEC v. Joiner Leasing Corp.*, 320 U.S. 344, 352-353 (1943)) (The test for what constitutes an "investment contract" under section 2 of the Securities Act "is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.").

On the basis of that analysis, he certainly could reasonably conclude that annuities are, in essence, tax-advantaged investment products that are typically marketed as such in direct competition with mutual funds, certificates of deposit and equity and fixed income securities.

There is a wealth of readily available information from which the Comptroller could determine the basis on which annuities are actually marketed to the public and the features of annuities that are important to potential investors. Indeed, newspaper advertisements and business publications directed at the investing public amply demonstrate these facts. *See, e.g., The Wall Street Journal*, Apr. 29, 1991, at C3 (advertisement for Fidelity Investments Brokerage Services) ("Choose from a wide variety of investments. From zero coupon bonds to unit investment trusts, stocks to options, mutual funds, annuities and much more, Fidelity gives you an unparalleled choice of investments"); *The Wall Street Journal*, May 13, 1991, at C13 (Seligman advertisement) ("Seligman has joined The Mutual Benefit Life Insurance Company to provide a tax-deferred variable annuity investment program for individuals. It also serves as the underlying investment program in what we believe is the most intelligent 401(k) plan yet devised . . . ."); Amy Dunkin, *Annuities: Gleaning Hard Facts From the Hard Sell*, Bus. Wk., Apr. 29, 1991, at 100 (annuities have been enhanced with "bells and whistles" to compete with mutual funds); Peter Weaver, *Annuities: An Old Product With Some New Wrinkles*, Nation's Business, June 1991, at 71 (annuities have "come up with all sorts of investment and payout options").[14]

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[14] These examples from the press were among those presented in NationsBank brief to the court of appeals. NationsBank Brief in the court of appeals at 46-48. While the Comptroller may not have actually looked at any of these specific materials, they are representative of the types of advertisements that are in wide use today. Since VALIC attacked the reasonableness of the Comptroller's finding that annuities

While some, but certainly not all, annuities may incorporate a mortality-related feature (*i.e.*, payments that end upon death), the Comptroller nonetheless could reasonably conclude that annuities are predominantly investment products rather than an insurance product protecting against catastrophic losses. Pet. App. 38a. Indeed, VALIC concedes that not all fixed and variable annuities contain a mortality-related feature. VALIC Brief in the court of appeals at 35-36 n.14. Moreover, even with respect to annuities that do have a mortality-related feature, the Comptroller clearly had a sufficient basis for finding that the mortality risk in an annuity contract is essentially an investment rather than an insurance risk because it acts in the exact opposite manner from life insurance. One is a lifetime investment agreement that benefits its purchaser; the other provides death benefits for the purchaser's surviving designated beneficiaries. As this Court has previously observed, "[a]ny risk that the prepayment [premium] would earn less than the amount paid to respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk . . . ." *Helvering v. Le Gierse*, 312 U.S. at 542.

are investment products, publicly available information of this type can be considered by this Court. The propriety of considering such materials has been acknowledged since the time of *Muller v. Oregon*, 208 U.S. 412, 420-21 (1908).

C. The Comptroller's Construction of the Incidental Powers Clause and His Analytical Approach Were Consistent with the Decisions of This Court and Significant Lower Court Decisions.

The Comptroller's construction of the incidental powers clause was consistent with the decisional law which has interpreted the incidental powers clause dynamically and functionally, and has never required a banking activity to be "indispensable" in order for it to be "incidental" or "necessary" to the business of banking. *Cf. Legal Tender Case, supra; M'Culloch v. Maryland, supra.*

In *Franklin Nat'l Bank v. New York,* 347 U.S. 373 (1954), the most recent case decided by this Court directly involving the incidental powers clause, this Court was required to consider whether a New York statute could prohibit a national bank from using the word "saving" or "savings" in its advertising or in the course of its business. In invalidating the New York statute, this Court construed the incidental powers clause as follows:

> Modern competition for business finds advertising one of the most usual and useful of weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.

Id. at 377-78. The use of the phrase "usual and useful" as well as the nature of the banking "activity" in question—advertising—certainly suggests that this Court endorsed a more flexible standard for determining the validity of an incidental banking power. This is in marked contrast to the draconian standard advanced by VALIC that would

require that a banking activity be absolutely indispensable to the conduct of the business of banking.

The Court's approval of this more flexible standard of construction also was reflected in the consideration in *Franklin* of the Federal Reserve Act, which the Court said should not "be construed to freeze individual banks . . . to the customs and practices [in use] preceding the statute." 347 U.S. at 377. This language strongly suggests a recognition of the dynamic nature of the banking industry, and the concomitant need for the nation's banking laws to be applied with appropriate flexibility.

In *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940), this Court held that national banks were authorized as an incidental power to operate a safety-deposit business. This Court considered it particularly relevant that banks, including competing state banks, commonly provided safety deposit services. This Court did not suggest, however, that the operation of a safety-deposit service was absolutely indispensable or necessary to the business of banking. Nonetheless, the Court determined that provision of this service was permissible for national banks.

More broadly, in its analyses of cases arising under the incidental powers clause, this Court has often reasoned by analogy, just as the Comptroller did when he compared the brokerage of annuities to the sale of certificates of deposit and other financial investment instruments. In *Colorado Nat'l Bank v. Bedford*, the Court reasoned that operation of a safety-deposit business was an incidental power because it was similar to a national bank's express power to accept special deposits.[15] Likewise, in *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 648 (1871) (certification of checks upheld as an incidental power), the Court recognized the close similarity between certifying checks

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[15] Special deposits "are monies and other valuables the identical deposits of which are kept, preserved and returned in kind." 310 U.S. at 49.

and the express power granted by the National Bank Act to discount and negotiate bills of exchange. In *Clement Nat'l Bank v. Vermont*, 231 U.S. 120, 139-40 (1913) (paying state taxes on behalf of depositors upheld as an incidental power), the Court determined that collecting taxes for depositors is similar to the express power of national banks to receive deposits. Finally, in *First Nat'l Bank v. City of Hartford*, 273 U.S. 548, 559-60 (1927) (sale of certain mortgages and other evidences of debt upheld as an incidental power), the Court found that these activities were closely related to the express power to loan money and to discount and negotiate other evidences of debt.[16]

The leading court of appeals decisions generally take a similar analytical approach, and reject a finding of indispensability as a necessary ingredient to determine that a particular activity is permissible as an incidental banking power. *First Nat'l Bank v. Taylor*, 907 F.2d 775, 778 (8th Cir.) (offering of debt cancellation contracts is incidental because it is useful to the bank by providing bank customers a convenient method of paying off a bank loan in case of death) ("The 'incidental powers' of national banks are not limited to activities that are deemed essential to the exercise of express powers"), *cert. denied*, 448 U.S. 972 (1990); *Securities Indus. Ass'n v. Clarke*, 885 F.2d

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[16] This Court also has looked to the importance of an activity to the economic vitality of national banks and of commerce and business generally. In *Merchants' Bank v. State Bank*, the Court noted that the practice of certifying checks had "grown out of the business needs of the country," and said that "we could hardly inflict a severer blow upon the commerce and business of the country than by throwing doubt on their validity." 77 U.S. at 648. Likewise, in *First Nat'l Bank v. City of Hartford*, the Court reasoned that "the exercise of this incidental power has become of great importance in the business of national banks," and cited statistics of the Comptroller as proof. 273 U.S. at 560. National banks' ability to sell annuities is as critically important to the retention of their competitive position at this time as their prior activities were in earlier times.

1034, 1049 (2d Cir. 1989) (sale of mortgage "passthrough" certificates authorized by the National Bank Act because "convenient and useful" in connection with bank's sale of mortgage loans), *cert. denied*, 493 U.S. 1070 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 281-82 (D.C. Cir. 1988) (sale of municipal bond insurance by national bank subsidiary falls within incidental powers because the insurance is essentially a credit product); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (National Bank Act authorizes personal property leasing that is incidental to national bank's express power to "loan money on personal property"), *cert. denied*, 436 U.S. 956 (1978); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 430, 433-34 (1st Cir. 1972) (operation of full-scale travel agency not within incidental powers because not convenient or useful in connection with any express power) ("[A] *sine qua non* standard would be an inappropriate measure of a national bank's incidental powers under 12 U.S.C. § 24, Seventh .... We do not believe 'necessary' was there used to connote that which is indispensable.").

The reasonableness of the Comptroller's construction of the incidental powers clause also draws significant support from the recent unanimous decision of the New York Court of Appeals, affirming the New York State Banking Department's determination that the sale of annuities is an incidental banking power of state-chartered banks. *New York State Ass'n of Life Underwriters, supra.*[17] The New York court rejected the argument that the New York

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[17] The New York Court of Appeals granted considerable deference to the Banking Department, because it was "presumed to have the requisite knowledge and understanding of the operational practices" of banks, leading it to apply a standard of review as to whether the Department's construction "was not unreasonable or irrational." 83 N.Y.2d at 360, 632 N.E.2d at 879. Certainly, the Comptroller should be entitled to no less deference here with respect to federal banking laws which he administers.

equivalent of the federal incidental powers clause should be narrowly construed.[18] Instead, it afforded the provision a "flexible" meaning, reasoning that the "business of banking" is "not [a] static" concept, 83 N.Y.2d at 361, 632 N.E.2d at 880, but rather should reflect the "ever-changing demands of the banking business." 83 N.Y.2d at 363, 632 N.E.2d at 881. Exactly the same analysis applies in this case.

By engaging in a comprehensive analysis which included a functional comparison of the brokerage of annuities to other well-settled activities authorized for national banks and a detailed consideration of the realities of the modern financial marketplace and the treatment of annuities within that marketplace, the Comptroller acted well within the bounds of the powers Congress vested in him and existing case law. The Comptroller's interpretive approach is fully consistent with analytical approaches sanctioned by this Court and by lower courts and, thus, is entitled to the protection against judicial encroachment accorded by *Chevron*.

D. Since At Least Some Types of Annuities Are Securities Within the Meaning of the Glass-Steagall Act, National Banks Also Possess an Express Banking Power to Broker Them.

The Glass-Steagall Act expressly authorizes national banks to engage in the business of "purchasing and selling

[18] The "incidental powers" clause of the New York Banking Law was the predecessor of section 24 Seventh as originally enacted in the National Bank Act of 1863. *See* Edward L. Symons, *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 689 (1983). Accordingly, the interpretation given to the New York clause clearly is instructive as to the meaning to be given to the comparable federal provision. *See* 2B N. Singer, *Sutherland Stat. Const.*, §§ 51.01, 51.06 (5th ed. 1992). Indeed, soon after the enactment of the National Bank Act, this Court found it relevant that its interpretation of the National Bank Act was consistent with that given to state banking law in states such as New York. *See Bank v. Lanier*, 78 U.S. (11 Wall.) 369 (1871).

. . . securities and stock without recourse, solely upon the order, and for the account of, customers . . . ." 12 U.S.C. § 24 Seventh. This authority, as noted previously, is equally applicable to operating subsidiaries of national banks. 12 C.F.R. § 5.34(d)(2).

Well prior to the Comptroller's Approval, in interpretive guidance issued in 1985, the Comptroller's staff confirmed, in OCC Ltr. No. 331, that national banks have the authority to broker variable annuities under the Glass-Steagall Act. OCC Ltr. No. 331 was reaffirmed by the Comptroller's staff thereafter. *See, e.g.*, OCC Ltr. No. 415, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,639, at 78,000 (Feb. 12, 1988); OCC Ltr. No. 429, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,653, at 78,032 (May 19, 1988).

The Comptroller's Approval stated as follows: "To the extent that the [Annuity] Contracts are Glass-Steagall securities, they would fall within the securities brokerage authority in 12 U.S.C. § 24(7) as well." Pet. App. 37a. The Chief Counsel's Letter, which served as the underlying legal basis for the Comptroller's Approval, makes clear that this reference was, at least in part, to OCC Ltr. 331. App. 3a. The Chief Counsel noted that the earlier interpretive guidance had concluded that variable annuities were Glass-Steagall Act securities based upon their "functional[ ] resembl[ance]" to mutual funds shares. *Ibid.*. The Chief Counsel's Letter and the Comptroller's Approval did not reach the issue of whether all fixed annuities were Glass-Steagall securities. In view of the respective findings in these letters that the brokerage of fixed annuities "is permissible because it is within banks' power to broker financial investment instruments" generally, it was unnecessary to more fully address this issue. Pet. App. 38a; App. 4a.

Nevertheless, the judgment of the court of appeals effectively prohibits national banks not located in small towns

from brokering any form of annuities contracts, including variable annuities. The brokerage of variable annuities was allowed prior to the Comptroller's Approval and was expressly reaffirmed by the Comptroller's Approval.[19] NationsBank and NSI had maintained before the district court and the court of appeals that the Glass-Steagall Act also authorized national banks to broker all types of annuities under such act. The district court had acknowledged the Comptroller's finding that, to the extent that the annuities at issue in the case were "Glass-Steagall securities, they would also fall within the securities brokerage authority of national banks." Pet. App. 33a.

The district court was not required to dwell at length on this issue in light of its ultimate decision upholding annuities brokerage under the incidental powers clause. The court of appeals did err, however, in not reaching the Glass-Steagall Act issue given its disposition of the other issues in the case. This Court may not be required, of course, to reach the issue as to whether national banks have the authority to broker annuities under the Glass-Steagall Act, if it otherwise determines that the court of appeals was in error and finds that national banks (and their operating subsidiaries) have the power to sell annuities. However, the issue is clearly presented by the facts and record of the case and is subsumed in the questions presented in the petitions for certiorari granted by this Court.

Any analysis of the application of the express brokerage power under the Glass-Steagall Act to annuities should begin with OCC Ltr. 331. The finding in OCC Ltr. No. 331 that variable annuities are Glass-Steagall Act "securities" had two stated bases. First, the Comptroller's staff relied upon the close functional similarity between variable annuities and mutual funds shares, which are concededly

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[19] The Complaint in this case clearly challenged NSI's authority to broker all forms of annuity contracts.

securities under the Glass-Steagall Act. The staff had noted that this Court in *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967), and the Federal Reserve Board in its regulations, 12 C.F.R. § 218.112, had relied upon the close comparability of variable annuities to mutual funds as a basis for finding them to be securities in other statutory contexts.

Second, the Comptroller's staff relied upon the fact that variable annuities are securities under the Securities Act.[20] Although the Comptroller has acknowledged that status as a security under the Securities Act is not necessarily dispositive of status as a security under the Glass-Steagall Act, it was reasonable to view the status of an instrument under the Securities Act as "highly relevant" to whether it should be found to be a security under the Glass-Steagall Act.[21] *See Securities Indus. Ass'n v. Board of Governors*, 807 F.2d 1052, 1063 (D.C. Cir. 1986), ("[W]e must consider Congress' understanding of the financial terms it used in one statute [the Securities Act] highly relevant to discovering the meaning attached to similar but ambiguous terms in the other [the Glass-Steagall Act]."), *cert. denied*, 483 U.S. 1005 (1987).[22]

Even without reference to OCC Ltr. 331, the conclusion that at least certain types of annuities are Glass-Steagall securities is compelling and by itself graphically illustrates the flawed reasoning of the court of appeals regarding deference. The Glass-Steagall Act does not explicitly define the term "securities," although the statute's use of the phrase "securities and stock" clearly implies that "securities" were intended to include more than simply stock.

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[20] Pet. App. 37a & n.2.

[21] Congress enacted the Glass-Steagall Act and the Securities Act within days of one another.

[22] *See also* OCC Ltr. No. 388, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,612, at 77,938 (June 16, 1987); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 150-52 (1984).

Moreover, the legislative history of the Glass-Steagall Act does not reflect any clear definition of the term "securities" on the part of its legislative draftsmen. Given the absence of an express definition by Congress, the term "securities" is precisely the type of term that regulatory agencies and courts are permitted to define on the basis of experience, policy and reason.

The fact that various federal agencies and courts acting under a variety of federal statutes have concluded that at least variable and some types of fixed annuities are "securities" is persuasive support for a similar meaning under the Glass-Steagall Act, given the absence of any legislative history to the contrary. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979) (construing statutory provisions with "common purpose" and language that is in *haec verba* to have same meaning); *Securities Industry Ass'n v. Board of Governors*, 807 F.2d at 1063 (meaning of the term "underwriter" in the Securities Act is "highly relevant to discovering the meaning attached to similar but ambiguous terms" in the Glass-Steagall Act), *cert. denied*, 483 U.S. 1005 (1987); *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187-89 (6th Cir. 1982) (similar language in Clean Water Act and Clean Air Act should be given similar construction), *aff'd*, 464 U.S. 165 (1984).

At least some fixed annuities also share the status of variable annuities as "securities" under the Securities Act. Section 3 of the Securities Act, entitled "Exempted Securities," provides an exemption from the registration requirements of the Securities Act to any of the following *classes of securities*:

> *Any* insurance or endowment policy or *annuity contract* or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions,

of any State or Territory of the United States or the District of Columbia.

15 U.S.C. § 77c(a)(8) (1982) (emphasis added). It would clearly have been unnecessary for Congress to have exempted annuities from the registration requirements of the Securities Act if Congress did not consider them to be securities.

Moreover, the Securities and Exchange Commission ("SEC") also appears to have concluded that at least particular types of fixed annuities are securities under the Securities Act. Rule 151, adopted in 1986 by the SEC under section 3(a)(8) of the Securities Act, provides a safe harbor exemption from *registration* under the Securities Act for qualifying fixed annuities. It presumably would have been unnecessary for the SEC to provide the Rule 151 safe harbor if it had concluded that fixed annuities were not *per se* securities for purposes of the Securities Act. Indeed, in the SEC Release accompanying Rule 151, the SEC indicated that Rule 151 "does not attempt to identify the outer limits of section 3(a)(8) beyond which a contract, though denominated 'insurance,' is a security subject to federal regulation." SEC Release No. 33-6645, 35 SEC Docket (CCH) 952, 953 (May 29, 1986), 51 Fed. Reg. 20,254, 20,255 (1986) (codified at 17 C.F.R. § 230.151).

This Court also has stated that fixed annuities, at least in certain circumstances, like variable annuities, are securities under the Securities Act. In *SEC v. VALIC*, in which it determined that variable annuities were not exempt from the registration requirements of the Securities Act, this Court stated that "the term 'security' as defined in the Securities Act is broad enough to include any 'annuity' contract." *SEC v. VALIC*, 359 U.S. at 67-68 (footnote omitted) (emphasis added); *see also SEC v. United Benefit Life Ins. Co.*, 387 U.S. at 210 (1967).

In *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1140-42 (7th Cir. 1986) (opinion on rehearing), *cert. denied*,

486 U.S. 1026 (1988), the Seventh Circuit directly addressed the status of fixed annuities under the federal securities laws. This case concerned a fixed annuity that created a general obligation of the issuing insurance company, and provided for a guaranteed minimum interest rate. The fixed annuity also provided for excess interest to be credited solely at the discretion of the issuer. Since the issuer did not limit changes in the excess rate to no more frequently than once yearly, the fixed annuity did not qualify for the Rule 151 safe harbor exemption. Consequently, the court held that the fixed annuity that was the subject of the case had to be registered under the Securities Act.[23]

The Glass-Steagall Act thus provides an alternative basis for upholding the power of national banks to broker annuities. Since securities brokerage is an express banking power, one which was reaffirmed by Congress after enactment of section 92, it is not subject to the position taken by the court of appeals with respect to the incidental powers clause that the "'specific limits'" of section 92 control over the "'general grant of power'" of section 24 Seventh.[24] Pet. App. 16a (quoting *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993)). Neither the decision of the court of appeals,nor any other decision relied upon by the court below, including Saxon, held that section 92 limited express, as contrasted with "incidental," banking powers. Therefore, a decision upholding the brokerage of some or all types of annuities under the Glass-Steagall Act, as

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[23] It would be anomalous, as an analytical matter, to conclude that the annuity considered in *Otto*, assuming that it had limited discretionary excess interest rate changes to no more than once a year and therefore came within the Rule 151 exemption from registration safeharbor, would not be a security at all for purposes of the Securities Act.

[24] Petitioners, of course, reject this position on its merits. *See infra* at 37-40.

an express banking power, would pretermit the need for an extended analysis of the scope of section 92.

III. SECTION 92 IS NOT A LIMIT ON NATIONAL BANK POWERS UNDER SECTION 24 SEVENTH AND DOES NOT APPLY TO NON-INSURANCE OR SPECIALIZED INSURANCE-RELATED PRODUCTS SUCH AS ANNUITIES

A. Section 92 Provides an Additional Grant of Power to National Banks.

By its terms, section 92 provides an express grant of supplemental power to national banks and is not, as the court of appeals held, a per se limitation on such powers. Section 92 provides that: "*in addition to* the powers now vested by law in national banking associations," national banks "may act as the agent for any fire, life or other insurance company . . ." (emphasis added). The use of the introductory phrase "in addition to" conclusively demonstrates that section 92 is a grant of additional powers to national banks, and is not intended as a limitation on bank powers under section 24 Seventh, including those authorized by the incidental powers clause. *See Heimann*, 613 F.2d at 1170 n.18 ("By its own terms," section 92 "does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies.").

Nor does this reading of the National Bank Act render section 92 "partially redundant," as the court of appeals suggested. Pet. App. 17a. No party has argued that the power of national banks to engage in insurance-related activities incidental to the "business of banking" under section 24 Seventh authorizes banks to engage in an *unlimited* general insurance agency business. It is this additional authority—to sell broad forms of insurance products that are not otherwise authorized for national banks—that section 92 gave to national banks with offices in small towns. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 959-61 (D.C. Cir. 1993) (upholding

Comptroller's interpretation of section 92 under *Chevron*). That additional authority does not in any way negate the possibility that the sale of annuities might also be either authorized pursuant to an express banking power such as Glass-Steagall authorized securities brokerage activities or sufficiently related to the business of banking to come within the incidental powers of national banks.

Although the clarity of section 92's language obviates the need to resort to the statute's legislative history, that history confirms that Congress was well aware that section 92 constituted an additional grant of national bank powers. Senator Owen, section 92's sponsor, described the provision as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,002 (1916); *see also* 53 Cong. Rec. 11,001 (1916) (Comptroller's letter explaining that the proposal resulted from consideration of "how the powers of these small national banks might be enlarged"); *Independent Ins. Agents*, 736 F.2d at 477 n.6 ("Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance").[25]

The Fifth Circuit, ignoring the literal language of section 92 and its legislative history, instead endeavored to divine a limitation on national bank activities through a misplaced reliance on the maxim "*expressio unius exclusio alterius.*" That maxim, however, "is only an aid in the ascertainment of the meaning of the law and must yield whenever a contrary intention on the part of the law-maker is apparent." *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 206 (1928). The maxim "can never override clear and contrary evidences of Congressional intent,"

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[25] The district court concurred with this view of the import of the legislative history. Pet. App. 33a ("[T]he legislative history of § 92 indicates that it was proposed to provide an additional source of revenue for national banks located in small towns and not to protect the markets from competing insurance agents.").

which is present here. *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940).

Moreover, when applying the *expressio unius* rule, a court necessarily reaches its construction by negative implication based on the language of the statute. *Chevron* holds, however, that things not "directly spoken to" by Congress create a delegation of legislative authority to the administrative agency. *Chevron*, 467 U.S. at 843-44. When a court invokes the *expressio unius* rule, by definition, Congress has not "directly spoken." Thus, the *expressio unius* rule directly conflicts with application of the first step of the *Chevron* analysis, and the court of appeals improperly attempted to apply both simultaneously. *See* Sunstein, 90 Colum. L. Rev. at 2109 n.182 (recognizing that the *expressio unius* rule "is a questionable one in light of the dubious reliability of inferring specific intent from silence").

The court of appeals also erroneously held that the "specific" terms in section 92 control the "general" grant of power in section 24 Seventh. Pet. App. 15a-16a. This argument ignores the language and fundamental structure of the National Bank Act. Assuming section 92 has any application to annuities at all, *see infra* at 40-45, section 92 is no more "specific" than section 24 Seventh with respect to insurance activities. Both statutory provisions provide some authority for national banks to act as agent for insurance companies and neither expressly limits such activities.

Indeed, if there is any presumption at all, that presumption should be that section 92 and section 24 Seventh do not conflict with or limit one another. *Pauley*, 501 U.S. at 706 (agency interpretation harmonizing related statutes and regulations is "presumptively reasonable"); *Anderson v. FDIC*, 918 F.2d 1139, 1143 (4th Cir. 1990) (courts should construe statutes harmoniously, especially if they involve the same subject matter). Since its adoption of section 92

in 1916, Congress has revisited section 24 Seventh and other provisions of the National Bank Act on many occasions, perhaps most prominently in connection with the enactment of the Glass-Steagall Act. Yet on none of these occasions did Congress choose to revisit the scope of the incidental powers clause. If any tension existed between section 24 Seventh and section 92, Congress certainly has had ample opportunities to modify one or the other provision during the past 78 years. The logical presumption from this history is that Congress saw no tension because it intended no limitation on section 24 Seventh by reason of its enactment in 1916 of section 92. *Cf. United States v. Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989) (an apparently specific provision may, in context, be construed as a general reference).

In sum, the Comptroller's construction of section 92 properly harmonizes the interplay between section 92 and section 24 Seventh: Section 24 Seventh grants powers incidental to the business of banking; section 92 grants additional, non-incidental banking powers. The Comptroller's interpretation is entirely consistent with the language and structure of the statute and is not "arbitrary, capricious, or manifestly contrary to the statute" under the second step of *Chevron*. *Chevron*, 467 U.S. at 844 (footnote omitted). Accordingly, the Comptroller's Approval should be upheld.

B. Annuities Are Not "Insurance" Within the Meaning of Section 92.

Even if section 92 were found to be a limit on section 24 Seventh, annuities do not constitute "insurance" for section 92 purposes. The Comptroller's Approval determined (Pet. App. 41a-47a) that annuities are not "insurance" within the meaning of section 92. The section itself neither defines the term "insurance" nor otherwise addresses the issue of annuities. Under *Chevron*, that definitional interstice in the banking laws is one that is left

for the Comptroller to fill, provided his interpretation is reasonable. *Chevron*, 467 U.S. at 843; *see also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). This approach is especially compelling here, since as the District Court noted, section 92 grants the Comptroller the express power to issue implementing rules and regulations. Pet. App. 33a.

The interpretation adopted by the Comptroller in this case is reasonable by any measure, and is entitled to substantial deference. The Comptroller first analyzed dictionary definitions to determine whether the term "insurance" included annuities. Not surprisingly, the Comptroller found that dictionary definitions of the term insurance "invariably" describe it as "a contract for indemnification against risk of loss." Pet. App. 43a-44a. He also considered the fact that annuities are typically marketed as investment products, particularly as "a tax-sheltered means of saving for retirement." Pet. App. 38a (footnote omitted). The Comptroller concluded, therefore, that annuity investors "are not seeking to pool a catastrophic risk," the hallmark characteristic of "insurance."[26] *Ibid.*

The Comptroller's conclusion—a reasonable statutory construction in and of itself—is reinforced by the extensive

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[26] In fact, as courts and commentators have recognized, "annuity and insurance are opposites." *Helvering v. Le Gierse*, 312 U.S. 531, 541 (1941); *accord* 1 J. Appleman, Insurance Law and Practices § 84 (1981) (the two are "diametrically opposed"). Insurance involves the payment of stated amounts over a period of years, in return for which the insurer agrees to pay a fixed amount in the event of a loss. 3A C.J.S. *Annuities 3c*, at 869. The insurer bears the risk that a loss will occur before the amount to be paid in premiums. In the case of an annuity, "[t]he positions are almost exactly reversed." 1 J. Appleman, *Insurance Law and Practices* § 84 (1981). The annuitant pays a fixed sum, in return for which the issuer must make a series of payments to the annuitant, usually over a period of years. In other words, "annuities are not indemnities for death but are investment for life." *Corporation Comm'n v. Equitable Life Assurance Soc'y*, 73 Ariz. 171, 175-76, 239 P.2d 360, 362 (1951).

case law recognizing that annuities are investment products and not insurance. *Helvering v. Le Gierse*, 312 U.S. 531, 541 (1941); *In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987) ("an annuity is essentially a form of investment") (quoting *In re Howerton*, 21 B.R. 621, 623 (Bankr. N.D. Tex. 1982); *Daniel v. Life Ins. Co.*, 102 S.W.2d 256, 260 (Tex. Civ. App. 1937) (an annuity is "essentially a form of investment"); *see also* 1 J. Appleman, *Insurance Law and Practices* § 84, at 295 (1981) ("[a]nnuity contracts must . . . be recognized as investments rather than as insurance).[27]

Despite this wealth of authority and reasoning, the court of appeals simply refused to even consider the reasonableness of the Comptroller's conclusion that annuities were not insurance under section 92. Instead, it concluded, without any attempt at meaningful analysis, that its earlier decision in *Saxon* decided the novel question presented by this case and somehow "trumped" *Chevron* deference.[28] As

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[27] As the Comptroller also noted, other courts have distinguished annuities from insurance in holding, for example, that annuities are not excludable as insurance for certain federal income tax purposes, are not insurance for purposes of the bankruptcy laws, and are not insurance under state law. *E.g., Estate of Keller v. Commissioner*, 312 U.S. 543, 544-45 (1941); *Kernochan v. United States*, 29 F. Supp. 860, 866 (Ct. Cl. 1939), *cert. denied*, 309 U.S. 675 (1940); *In re Walsh*, 19 F. Supp. 567, 571-75 (D. Minn. 1937); *In re Sothern's Estate*, 257 A.D. 574, 14 N.Y.S.2d 1, 3-4 (1939); *In re Rhodes' Estate*, 197 Misc. 232, 94 N.Y.S.2d 406, 411 (Surr. Ct. 1949); *People ex rel. Metro Life Ins. Co. v. Knapp*, 193 A.D. 413, 184 N.Y.S. 345, 347 (3d Dep't 1920), *aff'd mem.*, 231 N.Y. 630, 132 N.E. 916 (1921); *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510, 98 A. 1072, 1073 (1916); *State ex rel. Equitable Life Assurance Soc'y v. Ham*, 54 Wyo. 148, 88 P.2d 484, 488 (1939).

[28] Indeed, it is telling that even the minimal analysis in which the court of appeals engaged was flawed. For example, its reference to Black's definition of annuities (Pet. App. 10a) is taken not from the definition of "annuity," but from the definition of "annuity insurance" found under the term "insurance." Black's Law Dictionary 802-03 (6th

its initial response to the Comptroller's detailed analysis of an issue uniquely within his expertise, the court of appeals tersely stated: "We disagree." Pet. App. 10a.

The court of appeals' almost exclusive reliance on *Saxon* is misplaced. First, *Saxon* not only precedes *Chevron* by sixteen years, but also precedes a number of the decisional antecedents relied upon by *Chevron*. The *Saxon* court had no need, therefore, to address the level of deference a reviewing court owes to an administrative construction of a statute. Indeed, the *Saxon* court's entire approach to the interpretation of section 24 Seventh and section 92 was to treat the matter as one to be determined *de novo, i.e.*, as if the matter had arisen in the first instance in litigation between private parties.[29]

More importantly, the court of appeals' decision flies in the face of this Court's decision in *SEC v. VALIC*. In *SEC v. VALIC*, this Court squarely rejected the proposition, wrongly urged by VALIC in that case and again wrongly here, that because annuities are regulated by the states for certain purposes as insurance, they must be deemed insurance for all purposes. This Court found:

> [H]ow the States may have ruled is not decisive. For, as we have said, the meaning of "insurance"

ed. 1990). The definition of "straight annuity," applicable here, provides that this product is "*distinguishable* from [a] life insurance contract." *Id.* at 91 (emphasis added).

[29] Moreover, *Saxon* merely held that national banks have no power to act as general insurance agents in towns with a population greater than 5,000. *Saxon*, 399 F.2d at 1013. Thus, as the rehearing dissent observed, this is not a case in which upholding the Comptroller requires the overruling of judicial precedent. Pet. App. 24a (the "better view" is not to apply or overrule *Saxon*, but to defer to the Comptroller's determination that annuities are financial investment instruments, not insurance). The Comptroller properly and reasonably distinguished *Saxon* on the ground that section 92 does not apply to financial investment instruments merely because they also are sold by insurance companies and are regulated, for some purposes, by state insurance authorities.

> or "annuity" under these Federal Acts is a federal question.

359 U.S. at 69. Applying federal law, the Court held that variable annuities were not insurance under the statute in question. The court of appeals ignored the analysis applied in *SEC v. VALIC* and instead erroneously focused on the "superficial" similarity between insurance and annuities.[30]

The court of appeals' decision also runs afoul of *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), in which the Court recently reaffirmed the vitality of *SEC v. VALIC*. In doing so, the Court explicitly emphasized that:

> "[T]he assumption of an investment risk cannot by itself create an insurance provision under the federal definition. The basic difference between a contract which to some degree is insured and a contract of insurance must be recognized."

Id. at 528 n.13 (quoting *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967)). In *John Hancock*, the Court construed ERISA in light of its prior interpretation of the Securities Act. In construing the National Bank Act, the court of appeals should have done the same, but inexplicably did not.

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[30] To be sure, the court of appeals did not completely overlook *SEC v. VALIC*; however, it somehow ignored its holding. The Court's ruling, as shown above, contradicts the court of appeals' flat declaration in this case that annuities are "functionally and historically" an insurance product. Pet. App. 10a. Moreover, the court of appeals' reliance on a concurring opinion in that case as supporting its conclusion that annuities are "insurance" is particularly perplexing. *Ibid.* Justice Brennan, the author of the concurring opinion, expressly stated that the administration of the contracts at issue involved a "predominant element of the business of an *investment company*"—a fact that led him to conclude that the annuities were *not* "insurance." 359 U.S. at 81 (emphasis added).

Finally, the Comptroller's ruling that annuities are not "insurance" for federal banking law purposes draws persuasive support from the decision of the New York Court of Appeals in *New York State Ass'n of Life Underwriters, supra*. The New York Court of Appeals analyzed many of the same authorities considered by the Comptroller and concluded that "the great weight of authority supports the position that annuities are not insurance." 83 N.Y.2d at 363, 632 N.E.2d at 881. Rather, it found that annuities were comparable to other financial investment instruments that state-chartered banks commonly sell, including certificates of deposit and various types of securities. 83 N.Y.2d at 364, 632 N.E.2d at 882.

In short, the court of appeals erred by refusing to apply the *Chevron* standard of deference and by substituting its views *de novo* in an area in which it, unlike the Comptroller, lacked special expertise. Not only did the court of appeals ignore relevant case law, its decision conflicts with this Court's decisions in *SEC v. VALIC* and *John Hancock*. As a result, not surprisingly, its decision is fundamentally flawed and does not reflect the "hard [economic] realities" of annuities as a retail investment product.

C. Annuities Are a Specialized Insurance-Related Product that Are Not Subject to Section 92.

Even assuming arguendo that annuities might constitute "insurance" in the broadest sense of that term, they are a specialized form of insurance-related product that do not come within the purview of section 92. Section 92, by its terms, applies only to a national bank acting as the "agent for any fire, life, or other insurance company." Under the principle of *ejusdem generis*—a maxim of statutory construction overlooked by the court of appeals—a general term in a statutory list "should be understood in light of the specific terms that surround it." *Hughey v. United States*, 495 U.S. 411, 419 (1990); 2A N. Singer, *Sutherland Stat. Const.* § 47.17 (5th ed. 1992).

Applying this principle, any limitation imposed by section 92 would extend only to the sale of broad forms of insurance, such as fire and life insurance, which are specifically enumerated in the provision. It would not encompass more specialized forms of insurance-related products, such as annuities, which are authorized for national banks to sell. Indeed, application of *ejusdem generis* is necessary to give independent meaning to Congress' specification of "fire" and "life" insurance in section 92. Under the court of appeals' reading of the statute, those terms become unnecessary, since all types of insurance are encompassed in the phrase "any . . . insurance company."

The Comptroller's narrower reading of section 92 as excluding specialized insurance-related products is further supported by the *Heimann* decision. In that case, the D.C. Circuit held that credit life insurance is a "limited special type of coverage" that "in no way" involved the "operations of a general life insurance business." *Heimann*, 613 F.2d at 1170. The D.C. Circuit correctly distinguished *Saxon*, to which the court of appeals slavishly (and erroneously) adhered, as "not in point" because it involved the sale of "broad forms of automobile, home, casualty and liability insurance." *Ibid.; see also Independent Ins. Agents v. Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("[t]here is a strong argument that *Saxon* was wrongly decided.")

Moreover, contrary to the court of appeals' finding, the Comptroller's reading is supported by section 92's legislative history. The court of appeals references (Pet. App. 16a) documents written by the Comptroller and counsel to the Federal Reserve Board, prior to section 92's passage, purportedly to show a belief by Congress that national banks lacked authority to act as insurance agents before section 92 was enacted. *See* 53 Cong. Rec. 11,001 (1916); *Right of a National Bank To Write Insurance Through Its Officers*, 2 Fed. Res. Bull. 73, 74 (1916). But both documents refer to insurance in only general terms. 53 Cong.

Rec. 11,001 (1916) (referring to "fire, life, etc." insurance); 2 Fed. Res. Bull. at 73 (analyzing the power of national banks to write "fire, cyclone, liability and other kinds of insurance"). Neither suggests that specific kinds of insurance agency activity that are otherwise closely connected to banking would not be encompassed within the incidental powers clause of section 24 Seventh of the Glass-Steagall Act.

The Comptroller's Approval and *Heimann* also are consistent with other explicitly authorized post-*Saxon* banking activities. These activities include the sale of credit life insurance,[31] credit disability insurance,[32] municipal bond insurance,[33] mortgage life and disability insurance, involuntary unemployment insurance, and vendors single interest insurance (which protects a lender in case of loss or damage to personal property in which the lender has a security interest).[34] If the expansive and unsupportable interpretation given *Saxon* by the court of appeals is upheld, then the legality of all of the national bank activities relating to the above-enumerated specialized insurance-related products similarly would be called into question. Such a result would be highly disruptive to national banks and could have serious adverse financial implications for banks highly dependent on revenues from these financial products.

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[31] *See* 12 C.F.R. § 2.6; *Heimann*, 613 F.2d at 1168.

[32] *See* OCC Ltr. No. 283, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447, at 77,608 (Mar. 16, 1984); OCC Ltr. No. 495 *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,084, at 71,204 (Dec. 22, 1989).

[33] *See* OCC Ltr. No. 338, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508, at 77,790 (May 2, 1985); *American Ins. Ass'n v. Clarke*, *supra*.

[34] *See* OCC Ltr. No. 283, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447, at 77,608 (Mar. 16, 1984).

For these reasons, the Comptroller's determination that annuities brokerage was not a general insurance agency activity was clearly reasonable, consistent with the National Bank Act, and should be upheld.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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Dated: July 29, 1994

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

February 12, 1990

* * *

* * *

Dear * * *:

This responds to your bank's proposal relating to sale of annuity contracts, as described in two letters from the bank's counsel, *** and subsequent telephone conversations. You have proposed that your bank ("Bank") enter into an agreement with a marketing company ("Marketing") under which the Bank and its employees would promote and sell Flexible Payment Variable Annuity certificates (the "Certificates") issued by the Integrity Life Insurance Company (the "Company") in exchange for an assignment of Marketing's commission from the Company equal to 4.25% of the premiums generated from such sales. Bank employees who sold the Certificates would receive individual commissions of 0.25%, which would come out of the Bank's commission. Neither the Bank's nor the employees' percentage interest in premiums would vary with the volume of the Certificates sold.

You also inquired about the permissibility of a percentage leasing arrangement with Marketing under which a Marketing administrator would coordinate all annuity programs in the territory from offices located in the Bank. The Bank would provide office space, supplies, office equipment, and secretarial services, in exchange for rent equal to 0.25% of the premiums of all annuities sold by the programs for which the administrator is responsible.

For the reasons given below, we believe that the Bank's proposed activities are permissible under the National Bank Act.

The Certificates

The Certificates combine elements of variable and fixed annuities. An investor in a variable annuity contract purchases a share in an investment portfolio and then receives payments that vary according to the performance of the portfolio. A purchaser of a fixed annuity contract, in contrast, receives a fixed or minimum level of payments. Both types of contracts may have a life term.

The Certificates provide a tax-deferred investment vehicle with a wide range of investment options. A purchaser of a Certificate may allocate his investment among eight different "investment divisions" (the "Divisions"), which offer a variety of investment policies and risk and growth characteristics. Subject to certain limitations, an investor may from time to time make withdrawals against the current value of his Certificate (the "Certificate Value"), transfer funds among the investment divisions, and invest additional amounts in his Certificate.

Upon a prearranged date selected by the investor, the investor may choose to receive his Certificate Value as a lump sum or may choose from several annuity options. The annuity may be for a fixed term, for life, or for a minimum fixed term and thereafter for life. Annuity payments may be fixed in advance or may vary according to the value of the investor's Certificate Value.

Seven of the eight Divisions permit investors to purchase interests in a mutual fund (the "Trust"). The Trust is an open-end, diversified management investment company registered under the Investment Company Act of 1940 that offers its shares exclusively to separate accounts of several insurance companies to fund variable annuities. The Trust maintains seven classes of shares corresponding to seven of the Investment Divisions. These Investment Divisions are: the Common Stock Fund, the Aggressive Stock Fund, the Balanced Funds, the Bond Fund, the High Yield Fund, the Global Fund, and the Money Market Fund.

The value of an investor's share in each of these Investment Divisions depends on the performance of the underlying investment portfolio maintained by the Trust.

The eighth investment division, the "Guaranteed Interest Division," differs from the other divisions in that it offers a fixed level of interest. Funds allocated to the Guaranteed Interest Division become part of the general assets of the Company. The Company guarantees principal and interest on funds allocated to the Guaranteed Investment Division.

Sale of the Certificates

1. *Authority, 12 U.S.C.* § *24(7)*

The Certificates are called variable annuities, but the Guaranteed Interest Division option permits an investor to allocate some or all of his investment to what is, in effect, a fixed annuity. Although many state banks sell both types of annuities,[1] the OCC has only provided an opinion on the sale by national banks of variable annuities. *See* Interpretive Letter No. 331, April 4, 1985, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking Law Rep. (CCH) ¶ 85,501. That letter stated that variable annuity contracts are securities, functionally resembling shares in a mutual fund, and that banks are authorized, pursuant to 12 U.S.C. § 24(7) to buy and sell securities for the account of customers. To the extent that the Certificates are Glass-Steagall securities, they would fall within the securities brokerage authority in 12 U.S.C. ¶ 24(7) as well. (The Certificates are registered securities under the Se-

[1] *See Annuities Sales by Banks: An Up and Coming Business,* ABA Consumer Banking Digest, Sept./Oct. 1989, at 4-9 (bank annuity sales for 1990 predicted to be $10 billion); *Bank Annuity Sales Expected to Double in 1989,* National Underwriter (Life & Health/Financial Services Ed.), January 2, 1989, at 3.

curities Act of 1933,[2] but this is not dispositive of whether they are securities for purposes of the Glass-Steagall Act.) However, since we find that brokerage of fixed annuities is a permissible activity for national banks regardless of whether fixed annuities are Glass-Steagall securities, it is unnecessary at this time to determine the status of the Certificates under the Glass-Steagall Act. Brokerage of fixed annuities is permissible because it is within banks' power to broker financial investment instruments.

As part of their traditional role as financial intermediaries, banks have broad powers to buy and sell financial investment instruments as agent for customers. The Glass-Steagall Act explicitly preserved banks' brokerage power with respect to securities, but this power antedated the Glass-Steagall Act[3] and is not limited to securities. Pursuant to this power, national banks may broker a wide variety of financial investment instruments. *See* Interpretive Letter No. 494 (December 20, 1989) (agricultural, oil, and metals futures).

Although annuities have historically been a product of insurance companies, they are primarily financial investments. Investors who purchase annuities are not seeking

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[2] Some fixed annuities are exempt from the registration requirements of the Securities Act of 1933. *See* 15 U.S.C. § 77c(a)(8) (exempting "any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia.") This exemption has been construed to apply only to fixed annuities. *See SEC v. Variable Life Ins. Co.*, 359 U.S. 65 (1959). To distinguish annuities that qualify for the exemption from those that do not, the SEC has promulgated a "safe harbor" definition, Rule 151. *See* 17 C.F.R. § 230.151(a).

[3] *See Securities Industry Association v. Federal Reserve Board*, 468 U.S. 207, 214 (1984) ("Banks long have arranged the purchase and sale of securities as an accommodation to their customers. Congress expressly endorsed this traditional banking service in 1933.").

to pool a catastrophic risk such as death, injury or property damage, but are instead seeking a guaranteed, long-term return on their assets. Most commonly, annuities are marketed as a tax-sheltered means of saving for retirement.[4] The element of mortality risk, which is present in some annuities, derives from the investor's willingness to price a contractual arrangement based on the length of his life in order to increase the return he will receive during his lifetime. This risk is essentially an investment risk, not an insurance risk. *See Helvering v. Le Gierse,* 312 U.S. 531, 542 (1941) ("Any risk that the prepayment [premium] would earn less than the amount paid to respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk. . . ."); *In Re Howerton,* 21 Bankr. 621, 623 (1982) ("Both life insurance and annuity contracts may take various forms but the heart of the distinction between them is this: life insurance is a promise to pay a sum certain on the death of the insured and an annuity is essentially a form of investment which pays periodically during the life of the annuitant or during a term fixed by contract rather than on the occurrence of a future contingency."); *Daniel v. Life Ins. Co. of Virginia,* 102 S.W.2d 256, 260 (Tex. Civ. App. 1937) ("[An annuity] is essentially a form of investment, and uniformly held to be such, regardless of the fact that in its usual form payments are contingent upon continuity of the life of the grantee."); 1 J. Appelman, Insurance Law and Practice, § 84 (1981) ("annuity contracts must . . . be recognized as investments rather than as insurance"). *See also SEC v. United Benefit Life Ins. Co.,* 387 U.S. 202, 207-208 (1966) ("In fixing the necessary premium [for a fixed annuity] mortality experience is a subordinate factor and the planning problem is to decide what interest and expense rates may be expected. There

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[4] *See Helping Consumers Shelter Income,* ABA Banking Journal, July 1989, at 16-21 (discussing investment and tax shelter chracteristics of annuities).

is some shifting of risk from policyholder to insurer, but no pooling of risks among policyholders. In other words, the insurer is acting in a role similar to that of a savings institution . . . ."). Thus, although annuities often share with insurance the need for actuarial calculations, they are primarily a vehicle for investment.

That fixed annuities are financial investments is further demonstrated by the close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent. First, a fixed annuity is similar to a variable annuity. Both can offer the investor a stream of payments extending over his life, and both may involve actuarial calculations. Fixed annuities differ only in that they offer a reduced level of risk, combining for the risk-averse investor the best aspects of both certificates of deposit and annuities. The only distinction between a fixed and a variable annuity—the reduced level of investment risk for the customer—provides no basis for denying to national banks the power to sell fixed annuities as agent.

Second, fixed annuity contracts resemble debt instruments, in that both involve an obligation to make a stream of payments overtime.[5] Annuities differ in form from debts in that an annuitant only has an interest in the stream of payments, whereas a creditor has a right to the total

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[5] Many courts have held that an annuity contract creates a debtor-creditor relationship. *See John Hancock Mut. Life Ins. Co. v. Helvering,* 128 F.2d 745, 751 (D.C. Cir. 1942); *Hughes v. Sun Life Assurance Co. of Canada,* 159 F.2d 110, 113 (7th Cir. 1946); *Chatham v. City Hospital,* 25 F.Supp. 614 (S.D. Ga. 1971); *Moses v. Manufactures Life Ins. Co.,* 298 F.Supp. 321 (E.D. S.C. 1968); *Roth v. Kaptowsky,* 393 Ill. 484, 66 N.E.2d 664, 669 (1946); *Crossman Co. v. Rauch,* 263 N.Y. 264, 188 N.E. 748, 751 (1934).

See also Land, Life Insurance Option Settlements: Trusts or Debts, 42 Col. L. Rev. 32, 35-44, 47 (1942) (advocating view that an annuity contract creates a debtor-creditor relationship, but also discussing a few cases that hold that an annuity contract creates a trust).

amount owed, though the amount may be payable only in installments.[6] But a creditor, like an annuitant, only has an enforceable interest in the periodic payments due him. Thus, the practical obligations of an annuity issuer are essentially the same as those of a debtor.[7]

Finally, a fixed annuity also functionally resembles a certificate of deposit. A fixed annuity contract for a fixed term resembles a certificate of deposit that pays interest and automatically withdraws principal at a rate calculated to reduce the balance to zero at the end of the annuity term. An annuity with a life term resembles a life interest in a certificate of deposit. The owner of a life interest in a certificate of deposit has the right to receive income from the account for life, after which ownership of the account reverts to the owner of the remainder. *See* R. Cunningham, *The Law of Property* §§ 2.16, 4.11 (1984). This is precisely the same right that the owner of a life-term annuity has.[8]

Thus, neither of the two major features of fixed annuities, the fixed return and the life term, distinguish them from other financial investment instruments that banks may buy and sell as agent. The financial marketplace provides many examples of instruments that, like fixed annuities, pay the investor a fixed stream of income over

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[6] *See Matter of Young*, 806 F.2d 1303, 1306 (5th Cir. 1987); *Commonwealth v. Beisel*, 338 Pa. 519, 13 A.2d 419 (1940).

[7] Another feature of some fixed annuities that may call the debt analogy into question is the life term, but this is really more a matter of custom and pricing than of legal significance. Nothing prevents a debtor and creditor from contracting to settle a debt by a series of payments lasting for life rather than for a term of years. *See, e.g.*, Note, *Reverse Annuity Mortgages and the Due on Sale Clause*, 32 Stan. L. Rev. 143, 145-151 (1979) (discussing reverse annuity mortgages).

[8] Although banks do not ordinarily use actuarial calculations in setting interest rates, there are no limitations on how a bank may determine the interest rate paid on a deposit.

time in return for an initial investment. The life term feature is present in some variable annuities, and a life interest in in any instrument with a fixed return is, in effect, a fixed annuity. Therefore, fixed annuity contracts are financial investment instruments that national banks have authority to sell as agent.

2. ***Insurance, 12 U.S.C. § 92***

Although brokerage of fixed annuities is within the business of banking under 12 U.S.C. § 24(7), it is also necessary to consider the relationship between 12 U.S.C. § 24(7) and 12 U.S.C. § 92, which permits national banks in towns with 5,000 or fewer people to act as agent for fire, life or other general insurance companies. Conflicting judicial interpretations of section 92 have complicated this relationship. In one case, *Saxon v. Georgia Association of Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968), the court held that a national bank does not have authority to operate a general life and casualty insurance agency, arguing that the grant of insurance agency powers in section 92 implicitly prohibits national banks not located in small towns from selling fire, life, or other general insurance.

We disagree with the *Saxon* court's interpretive approach under section 92. The legislative history of section 92 indicates that the Comptroller of the Currency proposed it in 1916 to provide an additional source of revenue for national banks located in small towns.[9] The United States Courts of Appeal for the District of Columbia Circuit and the Eighth Circuit have, in dicta, construed section 92 consistently with the legislative history and have concluded that section 92 does not affect the powers of national banks located in towns that have a population larger than

[9] *See* 53 Cong. Rec. 11001 (1916) (letter from Comptroller Williams).

5,000.[10] This has been the traditional position of the OCC.[11]

However, even under the *Saxon* court's interpretation of section 92, that section should not bar national banks from brokerage of fixed annuities. As the court observed in *IBAA v. Heimann, Saxon* should only apply to products such as "broad forms of automobile, home, casualty and liability insurance", 613 F.2d 1164, 1170 (D.C. Cir. 1979), and not to more specialized forms of insurance such as credit life insurance. This limitation on *Saxon* is implicit in section 92 itself. Section 92 concerns the power of a national bank to act as agent for "any fire, life, or other general insurance company." Under the doctrine of "ejusdem generis," general words that follow an enumeration of specific examples are read to apply only to other items akin to those specifically enumerated. This doctrine confines section 92, and therefore *Saxon,* to types of insurance that are similar to fire and life insurance, such as other general casualty insurance policies. Therefore, section 92, even as the *Saxon* court interpreted it, does not affect the power of a national bank to sell more specialized products that are incidental to the business of banking, such as title insurance, credit life and disability insurance, and debt cancellation contracts.[12] Like title insurance, credit life in-

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[10] *See IBAA v. Heimann,* 613 F.2d 1164, 1170, n. 18 (D.C. Cir. 1979), *cert. denied* 449 U.S. 823 (1980) (Section 92 "[b]y its own terms . . . does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies."); *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve,* 736 F.2d 468, 477, n.6 (8th Cir. 1984) ("There is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance.").

[11] *See* Interpretive Letter No. 331, April 4, 1985, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501.

[12] *See* Interpretive Letter No. 368 (July 11, 1986), *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (national

surance, and debt cancellation contracts, fixed annuity contracts are a specialized product, unrelated to the general life and casualty policies that section 92 concerns, that banks have authority to sell as agent.

Indeed, it is doubtful that the word "insurance" in section 92 can be construed to include annuities. Since the term is not defined in section 92, it should be given its common meaning.[13] Dictionary definitions of "insurance" invariably describe it as a contract for indemnification against risk of loss. For example, Black's Law Dictionary (1979) defines "insurance" as follows:

> A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. . . . A contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event and is applicable only to some contingency or act to occur in future. An agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to other party upon destruction, loss, or injury of something in which another party has an interest.

See also Webster's Third International Dictio ry (1971) ("coverage by contract whereby for a stipul.ted consideration one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril"); *Random House Dictionary* (1973) ("coverage by contract

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bank may act as agent in the sale of title insurance incidental to authority to make loans secured by real property), Interpretive Letter No. 377 (February 6, 1987), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 85,601 (operating subsidiary of national bank may underwrite title insurance for its mortgage loan customers); 12 C.F.R. § 7.7495 (national banks may enter into debt cancellation contracts); 12 C.F.R. § 2.6 (national banks may also issue credit life insurance or sell credit life insurance as agent).

[13] *See* 2A Sutherland, *Statutory Construction* § 47.28 (4th ed. 1984).

in which one party agrees to indemnify or reimburse another for any loss that occurs under the terms of the contract"); *Oxford English Dictionary* (Compact ed. 1971) ("a contract by which the one party (usually a company or corporation) undertakes, in consideration of a payment (called a *premium*) proportioned to the nature of the risk contemplated, to secure the other against pecuniary loss, by payment of a sum of money in the event of destruction of or damage to property (as by disaster at sea, fire, or other accident), or the death or disablement of a person"); *Helvering v. Le Gierse,* 312 U.S. 531, 542 (1941) ("Historically and commonly, insurance involves risk-shifting and risk-distributing."). Most authorities hold that annuities are not insurance, because they do not incorporate the element of indemnification against risk.[14] Courts considering the status of annuities as "insurance" have held that annuities are not insurance for purposes of federal tax law[15], several state tax laws,[16] bankruptcy law,[17] and other laws.[18] Al-

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[14] *See generally* 1 J. Appleman, Insurance Law and Practice, § 84 (1981) ("annuity contracts must . . . be recognized as investments rather than as insurance").

[15] *See Helvering v. Le Gierse,* 312 U.S. 531, 542 (1941); *Keller v. Commissioner of Internal Revenue,* 312 U.S. 543 (1941) (Under federal tax law which excludes "amounts receivable as insurance" from decedent's gross estate for tax purposes, annuities are not treated as insurance.).

[16] *See Kernochan v. U.S.,* 29 F.Supp. 860 (Ct. Cl. 1939); *In re Sothern's Estate,* 257 A.D. 574, 14 N.Y.S.2d 1 (1939); *In re Rhodes' Estate,* 197 Misc. 232, 94 N.Y.S.2d 406 (N.Y. Surr. Ct. 1949) (Annuity contracts are not within New York tax law exemption, applicable to insurance payable to a designated beneficiary, from estate taxes.); *People v. Knapp,* 193 A.D. 413, 184 N.Y.S. 345 (1920); *Commonwealth v. Metropolitan Life Ins. Co.,* 254 Pa. 510, 98 A. 1072 (1916); *Daniel v. Life Ins. Co. of Virginia,* 102 S.W.2d 256, 260 (Tex. Civ. App. 1937); *State v. Ham,* 54 Wyo. 148, 88 P.2d 484 (1939) (Consideration paid for annuity con-

though annuities often share with insurance the need for actuarial calculations, they are primarily a vehicle for investment, not indemnification.

A few authorities have characterized annuities as "insurance." Most significantly, the cases construing the scope of section 3(a)(8) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(8), (exempting annuity and insurance contracts from the registration requirements of the Securities Act of 1933)[19] occasionally speak of fixed annuities as being "insurance" rather than "securities."[20] The exemption expressly covers both annuity contracts and insurance contracts, but the cases discuss the issue in terms of the distinction between "insurance" and "securities."[21] The

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tracts is not subject to tax law which taxes all "premiums" paid for insurance, because annuities are not insurance.)

[17] *See In re Walsh,* 19 F.Supp. 567 (D. Minn. 1937) (Annuity policy owned by bankrupt was not within insurance exemption to Minnesota bankruptcy law and therefore trustee in bankruptcy was entitled to the cash surrender value of the policies.); *In Re Howerton,* 21 Bankr. 621, 623 (1982).

[18] See Carroll v. Equitable Life Assurance Co., 9 F.Supp. 223 (W.D. Mo. 1934) (Defendant, a mutual insurance company forbidden by law to issue insurance contracts except by a "mutual plan", was nonetheless authorized to sell annuity contracts without a mutual plan because annuity contracts are investments rather than insurance.); Succession of Rabouin, 201 La. 227, 9 So.2d 529 (1942) (Insurance is not considered part of the decedent's estate for purposes of the law of "forced heirship", but annuities are part of the estate because they are not insurance.).

[19] Section 3(a)(8) is quoted *supra,* n. 2.

[20] *See SEC v. Variable Annuity Life Ins. Co.,* 359 U.S. 65 (1959); *SEC v. United Benefit LIfe Ins. Co.,* 387 U.S. 202 (1966); *Otto v. Variable Life Ins. Co.,* 814 F.2d 1127 (1986).

[21] *See e.g., SEC v. Variable Life Ins. Co.,* 359 U.S. 65, 75 (1959) (Opinion of Brennan, J.) ("The point [of the exemption] must have been that there then was a form of 'investment' known as insurance (including 'annuity contracts') which did not present very squarely the sort of problems that the Securities Act and the Investment Company

cases disregard state cases defining insurance on the grounds that the extent to which annuity contracts are insurance under a federal statute is a federal question.[22] The principal issue in these cases is the degree of investment risk that an annuity may incorporate without becoming a security subject to the Securities Act registration requirements. Those annuities that are exempt are labelled "insurance" and those that are not are labelled "securities."

These cases should not be read as holding that fixed annuity contracts are insurance for purposes of federal banking law. First, the holdings in these cases only address the applicability or inapplicability of the annuity exemption in § 77c(a)(8) to a particular instrument. The courts' characterization of the annuities in question as "insurance" is, therefore, dicta. Second, the analysis used to distinguish "insurance" annuities from "security" annuities only makes sense in the context of the federal securities laws. The standard that has emerged in this area focuses almost entirely on investment purpose and investment risk, so that an annuity may qualify for the "insurance" exemption even if it is totally lacking in mortality risk.[23] This standard is clearly narrowly tailored to the specific purposes of the Securities Act of 1933 and is therefore not useful in construing the term "insurance" generally.

Even under the *Saxon* court's reading of section 92, therefore, section 92 does not affect the power of a na-

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Act were devised to deal with, and which were, in many details, subject to a form of state regulation of a sort which made the federal regulation even less relevant."); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 210-211 (same); *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1141.

[22] *See SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. at 68-69.

[23] *See* SEC Rule 151, 17 C.F.R. § 230.151; SEC Securities Act Release No. 6645 (May 29, 1986), *reprinted in* [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,004.

tional bank to sell annuities as agent. Under the *Saxon* court's interpretation, section 92 only limits a national bank's power to sell general life and casualty insurance. This limitation does not apply to annuities because they are, like credit life insurance, a specialized product that banks have authority to sell as agent, and because, in any case, they are not insurance for purposes of section 92 since they lack the basic insurance characteristic of indemnification against risk.

3. *Supervisory Issues*

Sale of fixed annuities as agent is a logical complement to other financial services offered by the Bank, such as financial planning, investment counseling, and discount brokerage services. State banks are already offering this product to customers. This activity will provide a valuable additional source of income and activity will provide a valuable additional source of income and will help the Bank to compete effectively with other providers of financial services. Since the Bank will act only as agent, the Bank will not have a principal stake in annuity contracts and therefore will incur no interest rate or actuarial risks.

Customers will benefit from the increased range of products made available to them by the Bank. Brochures, forms, and the prospectus describing the Certificates clearly and conspicuously state that the Certificates are a product of the insurance company issuer. The risk that customers may confuse the Certificates with federally insured deposit accounts is, therefore, minimal. As an additional safeguard against such confusion, however, the Bank should expressly disclose in its own advertising and promotional materials, and the Bank's employees should disclose when describing the Certificates to customers, that the Certificates are not products of the Bank and are not FDIC insured. Moreover, the Bank should obtain from the customer before a sale is made a signed statement that the customer understands that (1) the annuity product is an

obligation of the issuing insurance company and not of the Bank, (2) the Bank is acting only as agent for the insurance company, and (3) the obligation is not FDIC insured.

Finally, the Bank should determine whether any state laws govern this activity, and to the extent that they do, should comply fully with them.

Incentive Program

The proposed incentive program is legally permissible. Twelve C.F.R. § 7.5000 provides that "(a) national bank may adopt any reasonable bonus or profit sharing plan designed to insure adequate remuneration of bank officers and employees." However, incentive pay programs must be undertaken with care. At the same time that such programs further legitimate interests of the Bank, they have the potential for creating unintended incentives for employees to engage in improper activities, such as illegal product tie-ins and unsound lending. *See* Interpretive Letter No. 86, from John G. Heimann, Comptroller of the Currency (April 3, 1979), *reprinted in* [1978-79 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,161 (providing discussion of concerns with one such program and some guidelines for addressing). Thus, in the design and implementation of such programs, banks must evaluate the potential for such unintended effects created by their proposed program's specific provisions and take special care to ensure that there are adequate policies and procedures to counter such potentialities. In this case, for instance, the Bank should have controls in place to ensure, at a minimum, that product tying is avoided and that all required disclosures are made by employees in the sale of the annuity product.

Percentage Lease

The OCC has conditioned banks' authority to lease on a percentage basis on their observance of the safeguards

enumerated in Interpretive Letter No. 274 (December 2, 1983), *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,438 (attached). If the requirements stated in that letter are met, then the percentage leasing arrangement will be permissible. For the foregoing reasons, I conclude that the activities proposed for the Bank are permissible under the National Bank Act. The Bank will be expected to comply with the requirements set forth above relating to disclosures in the Bank's promotional materials and employee representations and the receipt of a signed customer statement, and to the design and implementation of its incentive pay program and percentage lease arrangement.

Very truly yours,
/s/ Paul Allan Scott
Paul Allan Scott
Chief Counsel

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Nos. 93-1612 and 93-1613

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether federal law permits national banks, wherever located, to act as agents in the sale of annuities.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the captions, the parties in the court of appeals included the United States, the Office of the Comptroller of the Currency, and NCNB National Bank of North Carolina and NCNB Securities, Inc. (the corporate predecessors of petitioners NationsBank of North Carolina, N.A., and NationsBanc Securities, Inc.).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 998 F.2d 1295. That court's order denying rehearing and rehearing en banc, and

[1] "Pet. App." refers to the appendix to the petition in No. 93-1612.

the opinion dissenting therefrom (Pet. App. 18a-28a), are reported at 13 F.3d 833. The opinion of the district court (Pet. App. 29a-34a) is reported at 786 F. Supp. 639. The approval letter of the Office of the Comptroller of the Currency (Pet. App. 35a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. A petition for rehearing was denied on January 13, 1994. Pet. App. 18a-19a. The petitions for certiorari were filed on April 13, 1994, and were granted on June 6, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 5136 of the Revised Statutes of 1878, 12 U.S.C. 24, as amended, provides in pertinent part as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
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> * * * * *
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> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money

on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock[.]

2. Section 13, para. 9, of the Federal Reserve Act, Act of Dec. 23, 1913, ch. 6, 38 Stat. 263, 12 U.S.C. 92 (Supp. V 1993), provides as follows:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth

of any statement made by an assured in filing his application for insurance.

STATEMENT

1. This litigation involves a challenge to the Comptroller of the Currency's approval of an application by the corporate predecessors of petitioners NationsBank of North Carolina, N.A. and its brokerage subsidiary, NationsBanc Securities, Inc. (collectively, NationsBank), for permission for the subsidiary to act as an agent in the sale of a variety of fixed and variable annuity contracts. Although annuities come in many forms, in general they are contracts under which the purchaser makes one or more premium payments to the issuer, in return for the right to receive a series of periodic payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary. See generally D. Shapiro & T. Streiff, *Annuities* 2-4 (1992) (hereafter *Annuities*). The annuity contracts that NationsBank proposed to sell were "designed to provide investors with the opportunity to invest and accumulate capital on a tax-deferred basis, for retirement or other long-term goals." Pet. App. 35a.

"Immediate" annuities begin making periodic payments shortly after the contract is purchased, and are primarily a mechanism for structuring the investment of a given capital sum and its repayment on a level-payment, self-amortizing basis.[2] See *Annuities* 3.

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[2] That is, the amount of each periodic payment is fixed, and is calculated so that over the agreed or actuarially predicted payout period the purchaser will receive back an amount equal to the total premium paid, less applicable expenses and fees, plus interest at a predetermined rate. As explained below, modern annuities often guarantee a minimum fixed payment amount, but provide that the issuer may increase payments, in

Most annuities sold in the modern market, however, are "deferred" annuities. *Id.* at 4. Deferred annuities involve an initial "accumulation period," during which the purchaser's payments are held and invested by the issuer, and interest or investment returns are periodically credited to the purchaser's account. See *id.* at 3. At the end of the accumulation period the purchaser generally has the right to select one of a number of options for repayment of the account's accumulated value, including lump-sum distribution, systematic withdrawals, or the purchase of an "immediate" annuity (generally at rates specified in the original contract). *Id.* at 4.

Annuities are commonly described as either "fixed" or "variable." Those terms refer to the terms on which the annuity issuer promises to hold and repay the purchaser's investment. The issuer of a fixed annuity promises that the purchaser's investment will earn interest (during both the accumulation and the payout phase) at a modest guaranteed rate. In addition, most modern "fixed" annuities (including all those at issue in this case) also provide for the potential payment of "excess" interest, at the issuer's discretion and at whatever rate it may set from time to time (although a particular "excess" rate may be guaranteed for some period after inception of the contract). See Pet. App. 36a-37a & n.1; see generally *Annuities* 34-36, 41-42 & illus. 5.1; *Associates in Adolescent Psychiatry, S.C.* v. *Home Life Ins. Co.*, 941, F.2d 561, 564-568 (7th Cir. 1991) (discussing securities law consequences of particular "excess interest" structure), cert. denied, 112 S. Ct. 1182

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its discretion, on the basis of favorable overall investment experience.

(1992). Thus, the purchaser of a deferred fixed annuity relinquishes control over the invested premium and receives, in return, a general obligation of the issuer, backed by its overall credit and assets, that promises repayment of principal, a modest guaranteed return, and the possibility of greater returns based on the issuer's investment experience. See Pet. App. 36a; see also *Annuities* 39-40, 69-70.

In a "variable" annuity, on the other hand, the issuer typically promises to segregate premiums received from the purchaser into a separate account and to invest them in one or more of a number of possible investments—such as a group of mutual funds—as directed by the purchaser. The value of a deferred variable annuity during or at the end of the accumulation period is determined largely by the performance of the selected investments, although the issuer may guarantee preservation of principal or a modest minimum rate of return. Thus, the purchaser retains both substantial investment control and the associated risk of gain or loss. See generally Pet. App. 35a-36a; *Annuities* 5, 49, 51; Office of the Comptroller of the Currency (OCC), Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 at 71,211 (Feb. 12, 1990) (OCC Ltr. No. 499) (describing annuities involved in this case). A deferred annuity may be variable only during the accumulation period, or may continue to provide variable returns if the contract provides for (or the purchaser chooses) a variable annuity payout option. Compare, *e.g.*, *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 205-206 (1967), with *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69-72 & n.13 (1959).

Both fixed and variable annuities are covered by an unique and complex set of federal income tax rules that generally allow for deferral of tax on the investment returns allocable to a purchaser's annuity payments until those returns are withdrawn during the payout phase of the contract. See 26 U.S.C. 72; *Annuities* 70-73. Because the tax rules also generally provide for penalties if an annuity investment is withdrawn before the purchaser is 59½ years old, and for unfavorable tax treatment of amounts withdrawn before the maturity of the contract, annuities are frequently marketed as a tax-sheltered means of saving for retirement. See *Annuities* 7, 83-85, 107-108; 26 U.S.C. 72(e) and (q); Pet. App. 38a.

2. NationsBank sought approval from the Comptroller of the Currency for its proposal to act as a sales agent for (not as issuer of) a variety of annuity contracts that would allow purchasers to design "a flexible, multi-faceted investment package comprised of variable and fixed annuity options." Pet. App. 37a. The OCC Chief Counsel's interpretive letter underlying the Comptroller's approval of NationsBank's proposal (see *id.* at 35a) noted that the OCC had previously reached the conclusion that national banks have the authority to sell variable annuities, on the ground that "variable annuity contracts are securities, functionally resembling shares in a mutual fund, and * * * banks are authorized, pursuant to 12 U.S.C. § 24(7) to buy and sell securities for the account of customers." OCC Ltr. No. 499 at 71,211, citing OCC, Interpretive Letter No. 331, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (Apr. 4, 1985) (OCC Ltr. No. 331).[3] The

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[3] The second sentence of 12 U.S.C. 24 Seventh (added by Section 16 of the Banking Act of 1933 (Glass-Steagall Act),

Comptroller adopted (Pet. App. 37a) the Chief Counsel's view that insofar as the annuities involved in NationsBank's proposal were "securities" within the meaning of 12 U.S.C. 24 Seventh, they would fall within the scope of that prior determination. The additional analysis provided by the Chief Counsel's letter and the Comptroller's approval in this case therefore focused on NationsBank's proposal to market fixed annuities, although the approval extended to the entire range of annuity products described in the bank's application.[4]

The statutory grant of power to national banks, 12 U.S.C. 24 Seventh, provides that such banks may

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Act of June 16, 1933, ch. 89, § 16, 48 Stat. 184) refers expressly to the "business of dealing in securities and stock" by a national bank, but limits that business "to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account," and provides that banks "shall not underwrite any issue of securities or stock." OCC Ltr. No. 331 concluded (at 77,774) that because variable annuities are similar to shares in a mutual fund, they should be considered "securities" within the meaning of that provision, and therefore within the power of national banks to sell "solely upon the order, and for the account of, customers." Compare *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. at 71-72 (variable annuities are "securities" subject to the registration requirements of the Securities Act of 1933); *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. at 210-211 (1967) (same as to variable accumulation period of contract with fixed annuity payout option).

[4] The Comptroller determined (Pet. App. 37a-38a) that sales of fixed annuities were permissible even if such annuities were not "securities" for purposes of 12 U.S.C. 24 Seventh (see note 3, *supra*). He therefore had no occasion to consider the question whether fixed annuities are "securities," and that question is not presented in this case.

exercise "all such incidental powers as shall be necessary to carry on the business of banking." In applying that general provision to NationsBank's application, the Comptroller stated that "[a]s part of their traditional role as financial intermediaries, [national] banks have broad powers to buy and sell financial investment instruments as agent for customers." Pet. App. 38a. He noted that "[a]lthough annuities have historically been a product of insurance companies, they are primarily financial investments," because annuity purchasers "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a guaranteed, long-term return on their assets." *Ibid.* The opinion acknowledged the element of "mortality risk" present in some annuities, but concluded (in accordance with a number of authorities) that it "is essentially an investment risk, not an insurance risk," and that "although annuities often share with insurance the need for actuarial calculations, they are primarily a vehicle for investment." *Id.* at 38a-39a.

Further, the Comptroller found a "close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent" (Pet. App. 39a), including variable annuities, conventional debt instruments, and certificates of deposit. *Id.* at 39a-41a. Indeed, "[t]he financial marketplace provides many examples of instruments that, like fixed annuities, pay the investor a fixed stream of income over time in return for an initial investment." *Id.* at 41a. The Comptroller therefore concluded that "fixed annuity contracts are financial investment instruments that national banks have authority to sell as agent." *Ibid.*

The Comptroller next considered (Pet. App. 41a-47a) whether 12 U.S.C. 92 (Supp. V 1993), which permits national banks in towns of 5,000 or fewer inhabitants to "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums," by implication prohibits national banks in larger towns and cities from selling annuities. He first noted the OCC's traditional position that Section 92, which grants small-town banks general insurance agency powers "in addition" to their other powers as national banks, was intended only to provide such banks with an additional source of revenue, and implies no restriction on the powers conferred by Section 24 Seventh on all national banks, wherever located. Pet. App. 42a. Moreover, after reviewing available authorities (*id.* at 43a-47a), the Comptroller concluded that because annuities are "primarily a vehicle for investment" (*id.* at 45a) and "lack the basic insurance characteristic of indemnification against risk" (*id.* at 47a), they should not in any event be considered "insurance" for purposes of Section 92. Pet. App. 47a.

The Comptroller also pointed out (Pet. App. 42a-43a) that Section 92 speaks only of a bank's power to act as an agent for any "fire, life, or other insurance company." Applying the principle of "ejusdem generis," he concluded that the statute should be read to apply only to "types of insurance that are similar to fire and life insurance, such as other general casualty insurance policies." Pet. App. 43a. Thus, even if annuities were to be considered "insurance" for purposes of Section 92, they would remain "a specialized product, unrelated to the gen-

eral life and casualty policies that section 92 concerns." Pet. App. 43a. That Section would therefore have no application to annuities, which should be analyzed only to determine whether their sale was part of or incidental to "the business of banking" under 12 U.S.C. 24 Seventh. Pet. App. 43a.

Finally, the Comptroller determined (Pet. App. 47a-48a) that there were no policy or supervisory issues that counselled against permitting NationsBank to make agency sales of annuities. On the contrary, he noted that such sales would provide "a logical complement to other financial services offered by [NationsBank], such as investment advice and discount brokerage services," would provide additional income for the banks, and would help the bank "compete effectively with other providers of financial services." *Ibid.* Customers would also benefit from the increased range of products made available to them through the bank. *Ibid.* Because the bank would act only as agent, it would incur no interest rate or actuarial risks. *Id.* at 48a. Finally, in order to eliminate any risk of customer confusion, the Comptroller required that NationsBank "expressly disclose in its advertising and promotional materials, and * * * when describing the [annuities] to customers, that the [annuities] are not products of [NationsBank] and are not FDIC insured," and obtain a signed statement from each annuity purchaser acknowledging the bank's agency status and the lack of federal insurance. *Ibid.* On those conditions, the Comptroller permitted NationsBank to proceed with agency sales of annuities.

3. Respondent Variable Annuity Life Insurance Company, an issuer of annuities, filed suit in federal district court to overturn the Comptroller's approval.

The district court granted summary judgment for the Comptroller. Pet. App. 29a-34a. Addressing primarily respondent's argument under 12 U.S.C. 92, the court found it "neither arbitrary nor capricious" to view that Section "as a supplemental powers provision and not a limitation on national banks['] incidental powers under § 24(7)." Pet. App. 33a-34a. Moreover, applying the principles articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court deferred to the Comptroller's "reasonable interpretation" that "annuities are primarily financial investment instruments, not insurance" for purposes of the relevant banking laws. Pet. App. 33a. Finally, the court upheld as reasonable the Comptroller's determination that "annuities are a specialized product," unlike the general life and casualty insurance covered by Section 92. Pet. App. 34a.

The court of appeals reversed. Pet. App. 1a-17a. Relying in substantial part on its decision in *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), the court determined that 12 U.S.C. 92 imposes an affirmative limitation on the power of national banks not located in small towns to sell any form of "insurance." Pet. App. 6a-10a, 15a-17a. The court then rejected the Comptroller's conclusions that annuities are not "insurance" for purposes of Section 92 (Pet. App. 10a-13a) and that, in any event, the statute applies only to general forms of insurance akin to fire and life insurance (*id.* at 13a-14a).

The court read the legislative history of Section 92 to indicate that the general banking authority conferred by 12 U.S.C. 24 Seventh "did not grant banks the power to sell insurance products." Pet.

App. 16a-17a. The court remarked in passing (*id.* at 15a) that even if agency sales of annuities were "incidental" to the "business of banking," the power to make them could not be deemed "necessary" to carrying on that business under Section 24 Seventh's general grant of "all such incidental powers as shall be necessary to carry on the business of banking." In any event, the court held that even if Section 24 Seventh, read alone, would authorize banks to sell annuities, the specific limitations that the court found in Section 92 would supersede anything to the contrary in the more general statute. Pet. App. 15a-16a.

The full court of appeals rejected petitioners' suggestions of rehearing en banc, with six judges recused and four dissenting. Pet. App. 18a-19a. The four dissenters observed that "Section 92 nowhere defines 'insurance,'" and reasoned that "[u]nder *Chevron*, this should leave it to the Comptroller to arrive at a reasonable definition, insofar as [the statute] relates to the industry within his jurisdiction." *Id.* at 24a. Their opinion reviewed a number of relevant authorities (*id.* at 24a-27a) and concluded that on the question whether annuities are "insurance" for purposes of Section 92, "[t]he better view—and certainly a reasonable one that is entitled to deference under *Chevron*—is that of the Comptroller." Pet. App. 24a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Comptroller of the Currency has been charged by Congress with the oversight and regulation of national banks. See generally 12 U.S.C. 1, 26-27, 481; *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-627 (1971). In this case, the Comptroller deter-

mined that federal law permits such banks to act as agencies in the sale of annuities to their customers, because the power to conduct such sales is "incidental" to the "business of banking" under 12 U.S.C. 24 Seventh. That determination rests in large part on the Comptroller's conclusion that the annuities in question are functionally investment instruments for purposes of the federal banking laws, whether or not they are also "securities" that banks are expressly permitted to broker under Section 24 Seventh. National banks have traditionally served as intermediaries for their customers in the purchase and sale of financial investments. If annuities are investments, then acting as an agent for their sale is certainly part of, or incidental to, the business of banking.

The court of appeals overturned the Comptroller's decision in this case on the basis of two conclusions of its own: that annuities should be considered forms of "insurance" for purposes of 12 U.S.C. 92 (Supp. V 1993), and that Section 92 prohibits banks located outside small towns from acting as sales agents for any "insurance" product, even if the Comptroller has determined that sales of that product are incidental to the "business of banking." Both those conclusions are erroneous. Dictionary definitions, functional analysis and relevant authorities all indicate that annuity products are distinctly different from policies of insurance: instead of focusing on indemnification from risk of loss, they focus largely or even exclusively on investment management and the return of principal and investment income over time. Moreover, the language of Section 92 indicates that it is a grant of additional authority to national banks located in small towns to act as agents for the full

range of life and casualty insurance products, without regard to the relationship of those products to the business of banking; there is no reason to read it more broadly to prohibit national banks located in other places from acting as agents in the sale of particular "insurance" products when the Comptroller has specifically determined that such sales are properly incidental to the banks' business within the meaning of the general grant of authority found in 12 U.S.C. 24 Seventh.

In any event, the Comptroller's resolution of each of the questions of statutory interpretation involved in this case is clearly reasonable, and reflects the application of his specialized knowledge and policy judgment. The court of appeals erred in substituting its judgment for that of the Comptroller in an important area entrusted by Congress to the Comptroller's administrative oversight and regulation. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987); *Investment Co. Inst.* v. *Camp*, *supra*.

ARGUMENT

I. ACTING AS AN INTERMEDIARY WITH RESPECT TO CUSTOMERS' FINANCIAL INVESTMENTS FALLS WITHIN A NATIONAL BANK'S STATUTORY AUTHORITY TO EXERCISE "ALL SUCH INCIDENTAL POWERS AS SHALL BE NECESSARY TO CARRY ON THE BUSINESS OF BANKING"

A. Federal Law Grants National Banks Broad And Flexible Authority To Carry On The Business Of Banking

The first sentence of 12 U.S.C. 24 Seventh authorizes national banks

> [t]o exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

That provision originated in Section 11 of the 1863 statute that first established the national banking system. Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 668. Section 11 granted national banks the power

> to carry on the business of banking by obtaining and issuing circulating notes * * *; by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins, and bills of exchange; by loaning money on real and personal security * * *, and by exercising such incidental

> powers as shall be necessary to carry on such business[.]

The language, purpose, and original structure of the statute all indicate that Congress intended both to enumerate certain core banking activities, and also to leave ample scope for the exercise of other, unenumerated powers that might be or become part of or "incidental" to carrying on the business of banking.[5]

Section 11 of the 1863 Act was modeled on Section 18 of New York's Free Banking Law of 1838, ch. 260, 1838 N.Y. Laws 249. See Cong. Globe, 37th Cong., 3d Sess. 1114 (1863) (remarks of Rep. Spaulding); Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 160 (1970). That fact is significant because, at the time Congress passed the 1863 Act, New York's highest court had made clear that the state statute was to be broadly interpreted. In *Curtis* v. *Leavitt*, 15 N.Y. 9 (1857), the state Court of Appeals upheld the power of banks chartered under the Free Banking Law to borrow money in the course of their business, even though the statute did not specifically

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[5] One year after Section 11's initial passage, Congress changed its language to substantially the form it takes today. See Act of June 3, 1864, ch. 106, § 8, 13 Stat. 99, 101. There is no indication that Congress intended the 1864 consolidation of the statute's references to "carry[ing] on the business of banking" and "exercising * * * incidental powers" into one introductory clause to effect any substantive change in the authority conferred by the statute. See Symons, *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 700 (1983). Indeed, because the object of the 1864 Act was to encourage state banks to convert to national charters, it would have been counterproductive to use it to narrow the scope of national bank authority. *Ibid.*

grant any such power. One judge explained that the statutory specifications were not intended "to restrict the appropriate business of banking," *id.* at 58 (Comstock, J.), while another observed that the "implied powers" granted by the statute were "not enumerated and defined; because no human sagacity can foresee what implied powers may, [with] the progress of time, the discovery and perfection of better methods of business, and the ever-varying attitude of human relations, be required to give effect to the express powers." *Id.* at 157 (Brown, J.).[6]

Similarly, this Court has long allowed national banks considerable flexibility in exercising, under the Comptroller's supervision, the authority granted by Section 24 Seventh. Thus, national banks have been permitted to certify checks, *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604 (1871); purchase securities in the course of settling a claim, *First Nat'l Bank of Charlotte* v. *National Exch. Bank*, 92 U.S. 122 (1876); pay state taxes on depositors' accounts, *Clement Nat'l Bank* v. *Vermont*, 231 U.S. 120 (1913); operate a safe deposit business, *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41 (1940); and engage in advertising, *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373 (1954), although none of those activities is specifically mentioned in Section 24 Seventh.[7]

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[6] It is reasonable to assume that Congress was aware of the decision in *Curtis* when it passed the federal bank powers provision six years later. *Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 431 (1st Cir. 1972). Two of the three members of the House subcommittee that originated the federal statute—including Elbridge Spaulding, its principal draftsman—were New York bankers. Hammond, *supra*, at 159-160.

[7] This Court's decisions have adopted a pragmatic approach to the scope of bank powers. Thus, the Court has considered

Recent cases in the lower courts have continued to recognize that, because the banking business is continually changing and evolving, the powers of national banks "must be construed so as to permit the use of new ways of conducting the very old business of banking." *M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978) (power to enter into financing arrangements structured as leases); see also *First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 778 (8th Cir.), cert. denied, 498 U.S. 972 (1990) (debt cancellation contracts); *Securities Indus. Ass'n* v. *Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), cert. denied, 493 U.S. 1070 (1990) (issuance of mortgage pass-through certificates); *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278, 281-282 (D.C. Cir. 1988) (provision of municipal bond "insurance"); *Dyer* v. *Broadway Central Bank*, 169 N.E. 635, 636 (N.Y. 1930) ("care should be exercised not to cripple [banks] and break down their usefulness by a narrow and unreasonable construction of the statutes which will result in unwisely limiting their usefulness in the transaction of business under modern conditions."). And the New York Court of Appeals has recently reaffirmed, in upholding the authority

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it relevant that an activity "has grown out of the business needs of the country," *Merchants' Bank*, 77 U.S. (10 Wall.) at 648; that it is a "reasonable and appropriate measur[e] * * * to meet all the legitimate demands of the authorized business," *First Nat'l Bank of Charlotte*, 92 U.S. at 127; that it would "promote the convenience of [the] business," *Clement Nat'l Bank*, 231 U.S. at 140; that it is a "generally adopted method" of banking, *Colorado Nat'l Bank*, 310 U.S. at 50; or that "[m]odern competition for business finds [it] one of the most usual and useful of weapons," *Franklin Nat'l Bank*, 347 U.S. at 377.

of New York banks to sell fixed and variable annuities under state law, its longstanding broad construction of the statute that provided the original pattern for Section 24 Seventh: "We have long been mindful that the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a useful service." *New York State Ass'n of Life Underwriters* v. *New York State Banking Dep't*, 632 N.E.2d 876, 880 (1994).

B. Acting As An Intermediary In Customers' Investment Transactions Is Traditionally Part Of Or Incidental To The Business Of Banking

1. Brokerage of financial instruments, such as securities, has long been a customary part of the business of banking. Indeed, Congress acknowledged the power of national banks to engage in securities brokerage in Section 2 of the McFadden Act, Act of Feb. 27, 1927, ch. 191, 44 Stat. 1226, and Section 16 of the Glass-Steagall Act, Act of June 16, 1933, ch. 89, § 16, 48 Stat. 184. The McFadden Act explicitly authorized banks to engage in "the business of buying and selling securities"; the Glass-Steagall Act, a few years later, limited banks' "business of dealing in securities and stock" to purchasing and selling securities "solely upon the order, and for the account of, customers." 12 U.S.C. 24 Seventh. Neither Act created the authority for banks to broker securities; each merely recognized and regulated that authority, which stems instead from Section 24 Seventh's general grant of power to banks to "exercise all such incidental powers as shall be necessary to carry on the business of banking." See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 407-408 & nn.20-22

(1987) (before McFadden Act, banks conducted securities transactions "on a widespread * * * basis"); *Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 207, 215 (1984) ("[b]anks long have arranged the purchase and sale of securities as an accommodation to their customers"; Glass-Steagall "expressly endorsed" that "traditional banking service").

The authority of national banks to broker investment instruments for customers is not limited to instruments that are "securities" within the meaning of Section 24 Seventh and the Glass-Steagall Act. The Comptroller has explained that brokerage of investment instruments is generally within the "business of banking," because of the financial aspects of such brokerage and its relationship to other traditional banking functions:

> National banks possess various express or implied powers to invest in, trade, deal in, underwrite, and otherwise act in various capacities with a wide variety of financial, investment, and monetary instruments and other financial commodities (such as exchange, coin, and bullion). Banks are regular, active participants in the financial trading markets and normally will have trading expertise. It is a natural part of the same trading process for banks to serve as broker[s] for their customers in other transactions where the bank could not or does not serve as principal but where the trading activity is essentially similar.

OCC, Interpretive Letter No. 494, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,199 (Dec. 20, 1989) (OCC Ltr. No. 494). The Comptroller has accordingly permitted national banks to broker various other types of investment instru-

ments on behalf of their customers, whether or not particular instruments would be considered "securities" for purposes of Section 24 Seventh.[8] Thus, once the Comptroller had analyzed the characteristics of the annuities that NationsBank proposed to market and determined, as discussed below, that they were essentially investment instruments, it was reasonable for him to conclude that agency sales of such annuities fell well within the scope of national banks' traditional activities in brokering investment instruments for their customers.

2. The court of appeals suggested in passing (Pet. App. 15a) that Section 24 Seventh does not authorize agency sales of annuities, because the power to make such sales is neither "incidental" nor "necessary" to the "business of banking." Assuming that the court's brief remark to that effect should be regarded as an independent holding, it is incorrect. First, in light of

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[8] See OCC Ltr. No. 494 at 71,199-71,200 & n.4 (commodities futures and related options); OCC Letter No. 387, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,611 (June 22, 1987) (real estate loans); OCC Letter No. 365, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,535 (Aug. 1, 1986) (financial futures); OCC Letter No. 357, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,527 (Feb. 26, 1986) (options on financial instruments and on financial futures); OCC Letter No. 356, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,526 (Jan. 7, 1986) (agricultural and metal futures used for hedging); OCC Letter No. 326, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,496 (Jan. 17, 1985) (options); OCC Letter No. 271, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,435 (Sept. 21, 1983) (real estate loans and equity interests).

the history discussed above, the language of Section 24 Seventh explicitly recognizing banks' "business of dealing in securities and stock," and banks' "traditional role as financial intermediaries" (Pet. App. 38a), it is implausible to contend that brokering investment instruments on behalf of customers is not "incidental" to the traditional, let alone the contemporary, business of banking.

Second, the suggestion that the power to engage in activities that are properly part of or incidental to the banking business should be restricted by some narrow concept of what is "necessary" cannot be reconciled with the well-established proposition that the statutory term "necessary" need not mean "indispensable." As this Court recognized long ago, particularly when used to define general powers available to meet changing and unforeseeable future circumstances, the term need mean no more than convenient or useful. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413-415 (1819); see also *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992); *Black's Law Dictionary* 1029 (6th ed. 1990); *Curtis* v. *Leavitt*, 15 N.Y. at 64 (Comstock, J.); *New York State Ass'n of Life Underwriters*, 632 N.E.2d at 880; *M & M Leasing*, 563 F.2d at 1382. Moreover, even if the meaning of the word "necessary" in Section 24 Seventh might, at one time, have been open to question, that question has long been settled by the Comptroller, to whom Congress has entrusted the statute's administration. Both the Comptroller's view on that issue and his further determination of what "incidental powers" are "necessary" to allow national banks to conduct

their business are permissible constructions of the statute, and are entitled to deference. *National R.R. Passenger Corp.*, 112 S. Ct. at 1402.

II. THE COMPTROLLER REASONABLY DETERMINED THAT THE SALE OF ANNUITIES BY NATIONAL BANKS IS NOT PROHIBITED BY 12 U.S.C. 92

In rejecting the Comptroller's decision in this case the court of appeals relied primarily on its conclusion that bank sales of annuities, whether or not otherwise authorized under 12 U.S.C. 24 Seventh, are independently prohibited by 12 U.S.C. 92. Section 92 provides:

> In addition to the powers now vested by law in national banking associations * * *[,] any such association located and doing business in any place the population of which does not exceed five thousand inhabitants * * * may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums on policies issued by such company.

The Comptroller, on the other hand, determined that annuities are not "insurance" within the meaning of Section 92 (Pet. App. 43a-47a); and that, even if they were, Section 92 should not be read to limit their sale, particularly if such sales would be incidental to the business of banking under Section 24 Seventh. Pet. App. 41a-43a.

Section 92 itself neither defines the term "insurance" nor specifies whether its supplemental grant of authority is meant to limit the powers of national

banks not located in small communities. As the district court (and the dissenters from denial of rehearing en banc) recognized (Pet. App. 33a, 24a), those interpretive questions are for the Comptroller to answer, so long as his interpretations are reasonable. *E.g.*, *Chevron*, 467 U.S. at 843; see also *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-404. The Comptroller's conclusions in this case were reasonable, and the court of appeals erred in failing to defer to his construction of the statute.

A. The Comptroller Reasonably Determined That Annuities Are Not "Insurance" For Purposes Of Section 92

1. As the Comptroller's approval in this case explained, "[d]ictionary definitions of 'insurance' invariably describe it as a contract for indemnification against risk of loss." Pet. App. 43a-44a (citing examples). *Black's Law Dictionary* (6th ed. 1990), for example, defines "insurance" in part as "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils," or "undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." *Id.* at 802. *Webster's Third New International Dictionary* (1986) includes similar definitions: "a device for the elimination or reduction of an economic risk common to all members of a large group and employing a system of equitable contributions out of which losses are paid"; "coverage by contract whereby for a stipulated consideration one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril." *Id.* at 1173.

Definitions of the term "annuity," on the other hand, emphasize (as the term itself suggests) the periodicity of payments and their character as investment returns. Thus, *Black's Law Dictionary* describes an annuity (at 90) as "[a] right to receive fixed, periodic payments, either for life or for a term of years" or "[a] fixed sum payable to a person at specified intervals for a specific period of time or for life," and notes specifically that "[p]ayments represent a partial return of capital and a return (interest) on the capital investment." According to *Webster's* (at 88), the term means "an amount payable yearly or at other regular intervals (as quarterly) for a certain or uncertain period (as for years, for life, or in perpetuity)," or "a contract or agreement under which one or more persons receive annuities in return for prior set payments made by themselves or another (as an employer)." [9]

The difference in dictionary definitions reflects a difference in commercial and financial reality. In his decision in this case, the Comptroller first considered

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[9] The court of appeals cited (Pet. App. 10a) the reference to "annuity insurance" in the seven-page catalogue of descriptive "classifications" following the definition of "insurance" in *Black's Law Dictionary* (at 802). Although its meaning is not entirely clear, that reference appears to describe a particular type of insurance policy, the proceeds of which would be paid out as an annuity, rather than in a lump sum. That is, it seems likely that the description of "annuity insurance" is not meant to define the word "annuity," any more than the immediately following description of "assessment insurance" is intended to define the word "assessment." The definition of "annuity" (like the definition of "assessment") is located where one would expect it—under "A." See *id.* at 90; compare the descriptions of various types of annuities following the primary definition.

the functional nature of the annuity products in question, and concluded that they are "primarily financial investments." Pet. App. 38a. As the decision noted (*ibid.*), investors who purchase fixed annuities generally "are not seeking to pool a catastrophic risk such as death, injury or property damage, but are instead seeking a guaranteed, long-term return on their assets." [10] Indeed, "[m]ost commonly, annuities are marketed as a tax-sheltered means of saving for retirement." *Ibid.*

During the accumulation period, annuities bear a close functional resemblance to other investment products that banks would be allowed to purchase or sell on behalf of customers: mutual fund shares in the case of variable annuities (under which the purchaser retains significant investment control and risk), and conventional interest-bearing debt in the case of fixed annuities.[11] See Pet. App. 39a-41a; see

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[10] The amount of the return (or of principal) that is "guaranteed" may vary considerably from contract to contract. See generally pages 4-6, *supra*.

[11] As explained above (see pages 7-8 & n.3, *supra*), the OCC's legal staff some years ago reached the conclusion that national banks are permitted to broker variable annuities, on the ground that variable annuities resemble mutual fund shares and are "securities" for purposes of 12 U.S.C. 24 Seventh's explicit reference to banks' "business of dealing in securities." The Comptroller's decision in this case restated that conclusion as to variable annuities, and then proceeded to uphold the sale of fixed annuities on the broader ground that even if fixed annuities are not "securities" for purposes of Section 24 Seventh, they are "financial investment interests" that banks may buy and sell on behalf of customers as part of their "traditional role as financial intermediaries." Pet. App. 38a. The judicial opinions below in this case do not distinguish in their analysis between fixed and variable an-

also *New York State Ass'n of Life Underwriters* v. *New York State Banking Dep't*, 632 N.E.2d at 882. Many modern annuity products provide for single or staged investments, an interest rate that is known or predictable at the beginning of each accumulation period, and lump-sum withdrawals during or at the end of each period or at maturity of the entire contract. Others provide for single investments, a known or predictable interest rate, and a guaranteed payout over a set term of years. Annuities with such features are virtually indistinguishable from certificates of deposit (alhough without federal deposit insurance) or conventional debt. See generally, *e.g.*, *Annuities* 19-22, 44-45.[12] At the same time, some modern

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nuity products. In our view, the Comptroller's rationale for approving the sale of fixed annuities applies *a fortiori* to sales of variable annuities, which are even more clearly investment-oriented products; indeed, a primary rationale for the prior staff opinion was that variable annuities are primarily investment instruments. See OCC Ltr. No. 331, at 77,774, 77,776. Alternatively, the Comptroller's decision in this case adopts the legal staff's prior conclusion concerning variable annuities. Pet. App. 35a, 37a-38a; OCC Ltr. No. 499; cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) (agency decision may be upheld only on grounds relied upon by agency). That conclusion is also sound on its own terms (set out in OCC Ltr. No. 331), and the Comptroller's decision to adopt it is entitled to deference.

[12] "As annuity providers became more sophisticated in their marketing efforts, they began to design products that more closely resembled those of the competition. As an annuity was a safe place to invest money at a fixed return, the bank certificate of deposit became the target competition. These products have become known as *certificate* or *CD annuities.* * * * [T]hese products have met with outstanding success[.] * * * A certificate annuity is any product where the initial interest rate guarantee period precisely parallels the surrender charge

debt instruments involve mortality risks or other contingencies that may significantly affect the interest rate, the time at which repayment is required, or the amount of principal that must be repaid. See generally, *e.g.*, Note, *Reverse Annuity Mortgages and the Due-on-Sale Clause*, 32 Stan. L. Rev. 143, 145-151 (1979) (discussing mortgages that incorporate mortality risk); David Hariton, *The Taxation of Complex Financial Instruments*, 43 Tax L. Rev. 731, 731-732 & nn.2-7 (1988). There is therefore ample support for the Comptroller's conclusion that annuities of the type that petitioner NationsBank sought to make available for purchase by its customers are correctly characterized as investment products, rather than "insurance."

2. The only feature that may lend some annuities a flavor of insurance is the mortality risk assumed by one or both parties under some annuity contracts. Under the terms of a classic single-premium, immediate-payout fixed annuity (*i.e.*, one that provides immediate income, with no accumulation period during which income is deferred), the issuer agrees to make level periodic payments throughout (but not beyond) the life of the purchaser, and the amount of each payment is calculated so as to amortize the amount paid by the purchaser, together with interest at an agreed rate, to zero as of the purchaser's actuarially expected date of death. If the purchaser dies before that date, he loses part of his principal investment, and the issuer realizes a mortality gain; if the purchaser lives beyond that date, he continues to receive

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(or lack of surrenderability) period. * * * It is not a coincidence that this design is almost identical to a bank certificate of deposit." *Annuities* 44-45.

payments even though his principal has been exhausted, and the issuer realizes a mortality loss. The computations for and pricing of such a contract, like those of life insurance policies, depend on actuarial assumptions, and may reflect a single issuer's pooling of its mortality risks across a large group of purchasers.[13]

As this Court pointed out in holding that variable annuities are securities for purposes of the Securities Act of 1933, however, it is necessary to look beyond the "aspect of insurance" imparted by the presence of some mortality risk, and to focus on the characteristics of a particular product as they relate to a particular federal statutory scheme. *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. at 71. In that case, the relevant characteristic was the purchaser's assumption of substantial investment risk. *Ibid.* In this case, the relevant characteristic is the nature of the product, measured by its primary nature and purposes in the eyes of a prospective purchaser who is a customer of a national bank. From that perspective, the "insurance" aspect of any annuity contract is, as this Court said in an analogous context in *SEC* v. *Variable Annuity Life*, "apparent, not real; superficial, not substantial." *Ibid.*

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[13] Most annuity contracts provide for payment of the full accumulated account value to a designated beneficiary in the event that the purchaser dies during the accumulation period. The risk that a purchaser may die before the issuer has been able to recover its sales, administrative and investment expenses through the spread between its investment returns and the returns credited to the purchaser's annuity account may also be thought of as a "mortality risk" from the issuer's point of view. See *Annuities* 93. That risk is one that the issuer runs by reason of its pricing and marketing strategy, however, and is at most a minor feature of the annuity contract.

While both life insurance contracts and some annuities involve actuarial assumptions and mortality risks, the two products are very different from the purchaser's point of view. The point of an actuarial mortality assumption is that it represents a fair estimate, at the time of contracting, of the expected life of the purchaser. The dominant character of a contract that involves such assumptions is therefore determined by the results, under the contract, if those expectations prove true. The purchaser of term life insurance pays a small amount in relation to the face amount of the policy, and expects to receive no payment in return. The dominant characteristic of such a contract is therefore indemnification against the risk of an unexpected occurrence. The purchaser of a classic, immediate-payout fixed annuity, on the other hand, pays a comparatively large amount for his contract, and expects to receive it all back, with interest. The dominant characteristic of that contract is therefore investment for an expected future income stream.[14]

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[14] Under some life insurance policies a portion of each premium payment is invested and accumulates cash value over time. See, *e.g.*, *Black's Law Dictionary* 805 (6th ed. 1990) (descriptions of "universal" and "whole life" insurance); compare *id.* at 806 (description of "term insurance"). An annuity contract that requires or permits periodic investments (as opposed to payment of a single purchase price) bears some resemblance to the investment component of such insurance policies, but offers no analogue to the term life insurance component. That observation is consistent with the Comptroller's conclusion (Pet. App. 45a) that annuities are "primarily a vehicle for investment, not indemnification." Annuities and cash-value life insurance also both typically allow invested funds to compound on a federal income tax-deferred basis. The tax benefits accorded annuities do not, however,

Thus, even in the case of the classic immediate-payout, lifetime-based fixed annuity—the annuity contract with the most prominent "mortality risk" feature from the purchaser's point of view—the distinction between annuities and life insurance is quite apparent. As one court aptly put it, "annuities are not indemnities for death but are investments for life." *Corporation Comm'n* v. *Equitable Life Assur. Soc'y*, 239 P.2d 360, 362 (Ariz. 1951); see also *Helvering* v. *Le Gierse*, 312 U.S. 531, 541 (1941) (in terms of mortality risks, "annuity and insurance are opposites"); *Annuities* 7.[15] Nor do immediate-payout fixed annui-

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depend on assimilating the annuity contract to insurance; annuities are treated as *sui generis* for federal income tax purposes. See 26 U.S.C. 72. In fact, it is interesting to note that death benefits received by beneficiaries under life insurance contracts are generally excluded from gross income for federal income tax purposes, whereas amounts received by a beneficiary under an annuity contract by reason of the death of the purchaser are, like other annuity payments, exempt only to the extent that they represent a return of the purchaser's invested capital. See generally 26 U.S.C. 72(e), 101(a); see also Rev. Rul. 79-335, 1979-2 C.B. 292, 294.

[15] "[A]n annuity is a cash contract * * * whose orientation to the insurer is primarily investment or asset management, and secondly, mortality management. That single fact differentiates the annuity from the life insurance product. Unlike a life insurance policy, where the primary objective is to provide death protection or estate protection for a deceased's survivors, the primary objectives of the annuity are *tax deferral, safety* and a *higher yield* than what can typically be found in a certificate of deposit, money market or savings account. Those objectives are used by the contract-holder to accumulate funds for retirement, create income for retirement or both." *Annuities* 7. The same source explains that "Annuities have very little mortality risk. * * * Instead, the annuity is an asset-management product, by which the insur-

ties—whether purchased on their own, or selected as a payout option after the accumulation period of a deferred fixed or variable annuity contract—represent the entire modern annuities market. Other types of annuity contract are much more common, and even less like insurance.[16] For example, many contemporary annuities (sometimes called "refund" annuities)

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ance company makes its profit from the difference between what it can earn on its investments, and what it then pays out to the contract-holder in the form of interest rates credited to the contract." *Ibid.*

[16] Statistics compiled by the American Council of Life Insurance indicate that of 20,383,000 fixed annuity contracts issued by insurance companies and in force at the end of 1992, 89% were deferred annuities in the accumulation period. American Council of Life Insurance, *1993 Life Insurance Fact Book Update* 18 (1993) (ACLI *Update*). Of the remaining 11%, just over half (55%) were individual contracts—that is, either single-payment immediate annuities, or deferred annuities in the payout phase under which the owner had selected annuitized payments (rather than a lump-sum or "systematic withdrawals," as described below). The remainder were "supplementary contracts," providing annuitized payments of the death benefit on a life insurance policy, or of the accumulated value of a deferred annuity contract terminated by reason of the death of the purchaser. The figures for both individual and supplementary contracts include all types of annuitized payments—those payable for the life of the annuitant (and/or another beneficiary), those payable for life but with a guaranteed minimum term, and those payable for a specified term without regard to mortality. Thus, "classic" single-payment immediate annuities with a simple lifetime payout term would represent less than—and probably significantly less than—11% of the fixed annuities outstanding at the end of 1992. And those figures do not include another 6.6 million or more persons covered by individual or group variable annuity contracts issued by insurance companies. *Ibid.*

guarantee the return of the purchaser's principal investment (and perhaps a specified return), even if the purchaser dies during the payout phase but before the actuarially predicted time. See, *e.g.*, *Annuities* 20-22. Such provisions eliminate any mortality risk on the part of the purchaser, and severely limit the issuer's ability to pool positive and negative mortality experience over a broad group of annuities.

In addition, most deferred annuities provide the purchaser with the option to take payment in a lump sum at the end of the accumulation period; as regular payments over a fixed term of years, without reference to the life of the purchaser; or through "systematic withdrawals" flexibly arranged to meet the purchaser's needs, with any remaining principal paid to a beneficiary on the purchaser's death. See, *e.g.*, *Annuities* 4, 21-22, 24-26 & illus. 3.5, 122-123 (sample contract). Under those options the contract involves no element of mortality risk whatsoever, and does not even vaguely resemble "insurance." Moreover, even in cases where both return of the original investment and continued payment over the life of the purchaser is guaranteed, the remaining "mortality" element—the risk of unexpected longevity—might be characterized variously as "insurance" of a sort, as a contingent debt of the issuer, or as a contingent, post hoc adjustment in the guaranteed rate of return on the purchaser's investment. See *Annuities* 23 illus. 3.3 (computing effective rates of return under various payout options and assumptions).

The salient financial characteristics of annuities thus make clear that they are, as the Comptroller concluded, either wholly or overwhelmingly investment products. It is therefore not surprising that,

as the New York Court of Appeals recently observed, "the great weight of authority supports the position that annuities are not insurance." *New York State Ass'n of Life Underwriters* v. *New York State Banking Dep't*, 632 N.E.2d at 881. See also, *e.g.*, Pet. App. 38a-39a, 44a-45a and authorities there cited; *Annuities* 7 (in contrast to life insurance, "[a]nnuities * * * are primarily investment products"); 1 J. Appleman, *Insurance Law & Practice* § 84, at 295 (1981) ("Annuity contracts must * * * be recognized as investments rather than as insurance."); *In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987). The Comptroller's opinion in this case marshalled (Pet. App. 45a) numerous court decisions holding that annuities are not "insurance" for a variety of tax, bankruptcy, and other federal and state law purposes.[17]

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[17] The Comptroller acknowledged (Pet. App. 46a) that cases construing the exemption for any "insurance or endowment policy or annuity contract or optional annuity contract" under Section 3(a)(8) of the Securities Act of 1933, 15 U.S.C. 77c(a)(8), "occasionally speak of fixed annuities as being 'insurance' rather than 'securities.'" See, *e.g.*, *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1966); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); see also SEC Rule 151, 17 C.F.R. 230.151. However, as the Comptroller pointed out (Pet. App. 46a), the text of Section 3(a)(8) itself refers to both "annuity contract[s]" and "insurance * * * polic[ies]," rather than merely subsuming the former under the latter heading. Compare 26 U.S.C. 816(a) (defining "life insurance company" as "an insurance company which is engaged in the business of issuing life insurance *and* annuity contracts" (emphasis added)). In any event, as the Comptroller noted (Pet. App. 46a-47a), cases under Section 3(a)(8) interpret a different statute with different purposes, and do not control the analysis in the context of the banking statutes.

3. The court of appeals criticized the Comptroller's determination that annuities are not "insurance" for purposes of Section 92 on the ground that annuities are often issued by life insurance companies, and are typically regulated under state insurance laws. Pet. App. 10a-11a & n.2. But an annuity contract is not "insurance" simply because it has been issued by an insurance company, see *In re Howerton*, 21 B.R. 621, 623 (Bankr. N.D. Tex. 1982); and regulation of annuities under state insurance laws reflects little more than the fact that insurance companies have traditionally written a large proportion of annuity contracts. See *Daniel* v. *Life Ins. Co. of Va.*, 102 S.W.2d 256, 261 (Tex. Civ. App. 1937); compare *Rishel* v. *Pacific Mutual Life Ins. Co. of Cal.*, 78 F.2d 881, 883-884 (10th Cir. 1935) (annuity not "policy of insurance" required to be filed with Colorado Insurance Commissioner); *Chatham County Hosp. Auth.* v. *John Hancock Mut. Life Ins. Co.*, 325 F. Supp. 614, 619 (S.D. Ga. 1971) (annuities not regulated as "insurance" in Georgia in 1955). Both the court of appeals' observations beg the relevant question whether annuities are properly considered "insurance" or investment instruments for federal banking law purposes.[18] *New York State Ass'n of*

[18] As this Court recognized in the context of determining the treatment of variable annuities under the federal securities laws, what constitutes "insurance" within the meaning of a federal statute is a question of federal law. *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. at 69; cf., *e.g.*, *Dickerson* v. *New Banner Inst.*, 460 U.S. 103, 111-112 (1983) (meaning of "convicted" in federal statute was question of federal law, although offense and punishment were defined by state law); *United States* v. *Bess*, 357 U.S. 51, 55-57 (1958) (whether contract rights defined by state law constitute "property" under federal tax lien statute is a matter of federal law).

Life Underwriters, 598 N.Y.S.2d 824, 828 (App. Div. 1993), aff'd, 632 N.E.2d 876 (N.Y. 1994).

The court of appeals asked that question but reached the wrong conclusion. Pet. App. 12a-13a. The court recognized that, as discussed above (see pages 29-31, *supra*), annuities with lifetime payout terms may be thought of as the "inverse" or "mirror image" of term life insurance, in the sense that the mortality risk involved in one case is that the purchaser will live too long, while in the other case it is that he will die prematurely. Pet. App. 12a. But to say that two things are the "inverse" of each other is not to say that they are the same. As explained above, protecting against mortality risk is the primary functional and financial aspect of a life insurance contract. In the case of annuity contracts, on the other hand, protecting against such risk is typically no more than a supplemental consideration in an arrangement primarily concerned with the management and staged repayment of invested funds. It therefore makes little sense to argue that the banking laws should treat the two products as identical.

In all events, the court of appeals erred in approaching the question whether annuities should be viewed as "insurance" for purposes of Section 92 essentially *de novo*. That court should, like the district court, have confined its review to inquiring whether the Comptroller's fundamental determination that annuities are primarily investment vehicles, rather than contracts of indemnification, represented a permissible interpretation of the statute. See, *e.g.*, *Chevron*, 467 U.S. at 843-845; *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-404; *Investment Co. Inst.* v. *Camp*, 401 U.S. at 626-627. As the preceding discussion demonstrates, the Comptroller's interpre-

tation was at least a reasonable one. Having failed to impeach its reasonableness in light of the language and purposes of Section 92 and the remainder of the federal banking laws, the court of appeals erred in substituting its judgment for that of the Comptroller on matters within his expertise and regulatory competence.[19]

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[19] In its opposition to the certiorari petitions in this case, respondent contended (Br. in Opp. 12) that the Comptroller's determination is not entitled to deference because its is inconsistent with positions taken in 1978 and 1982. Even revised administrative positions are, of course, entitled to deference. *E.g., Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2160-2161 (1993). The letters to which respondent refers, however, "hardly establis[h] an inconsistent policy." *Thomas Jefferson Univ.* v. *Shalala*, No. 93-120 (June 24, 1994), slip op. 11-12. As we pointed out in our reply brief at the petition stage (at 3-4), the 1978 letter represents informal advice by an agency lawyer, contains no analysis supporting the views expressed, and clearly identifies its conclusions as the personal opinion of its author. See Br. in Opp. 1a-2a. Such a letter would not bind the agency or the recipient or be subject to review by the courts. See *New York Stock Exch.* v. *Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978); *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. 491, 494 (W.D. Tex. 1989). It therefore cannot provide a basis for contending that the agency has changed course. *Independent Ins. Agents* v. *Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993). The 1982 letter sets forth a similar informal opinion by a member of the OCC legal staff. See OCC Interpretive Letter No. 241, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,405 (Mar. 26, 1982). Moreover, as explained in our reply brief (at 4-5), that letter's discussion of sales of term life insurance does not conflict with the Comptroller's decision in this case concerning annuities.

B. The Comptroller Reasonably Concluded That Section 92 Does Not Prohibit Agency Sales Of Specialized "Insurance" Products Outside Small Towns If The Comptroller Has Determined That Such Sales Are Part Of Or Incidental To The Business Of Banking

The court of appeals also erred in refusing to defer to the Comptroller's conclusion that even if annuities were to be considered "insurance" for purposes of 12 U.S.C. 92, the statute should not be construed to prohibit banks outside small towns from selling them (as agents) once the Comptroller has concluded that such sales are incidental to the business of banking.

Section 92 provides that "[*i*]*n addition to* the powers now vested by law in national banking associations," national banks in small towns may "act as the agent for any fire, life, or other insurance company" in selling insurance policies (emphasis added). The introductory phrase "in addition to" shows that Section 92 is a grant of additional powers for a special situation.[20] It does not purport to define, or confine, the scope of the other lawful "powers" whose existence it assumes and supplements. Those

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[20] The statute's legislative history also indicates that Congress thought of Section 92 as a grant of additional powers, not a limitation on otherwise authorized activities. Senator Owen, Section 92's sponsor, described the provision as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,002 (1916); see also *id.* at 11,001 (Comptroller's letter explaining that proposal reflected consideration of "how the powers of these small national banks might be enlarged"). See also *Independent Ins. Agents* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance.").

powers, which pre-date and survive Section 92, include the general authority under Section 24 Seventh to "exercise * * * all such incidental powers as shall be necessary to carry on the business of banking." Even if annuities were "insurance" for purposes of Section 92, there would be no reason why the Comptroller could not conclude that those incidental powers extend to acting as a sales agent for limited classes of such "insurance" products whose essential investment character also brings them within the ambit of banks' traditional investment activities on behalf of their customers.[21]

To be sure, Section 92 carries some negative implication; Congress would have had little reason to grant small-town banks the power to act as general

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[21] The court of appeals cited (Pet. App. 16a) documents written by the Comptroller and counsel to the Federal Reserve, prior to Section 92's passage, to show that Congress believed national banks had no authority to act as insurance agents before Section 92 was enacted. See 53 Cong. Rec. 11,001 (1916) (letter from Comptroller Williams to Senator Owen); Right of a National Bank To Write Insurance Through Its Officers, 2 Fed. Res. Bull. 73, 74 (1916) (letter from Board Counsel Elliot to Board Governor Hamlin). Both documents refer to insurance in broad terms. See 53 Cong. Rec. 11,001 (1916) (referring to "fire, life, etc." insurance); 2 Fed. Res. Bull. at 73 (analyzing the power of national banks to write "fire, cyclone, liability or other kinds of insurance"). Neither suggests that specific kinds of insurance agency activity that are closely connected to banking would not fall within the incidental powers of national banks. In any event, slim intimations of possible administrative or congressional understandings in 1916 form at best a "hazardous basis" for determining the meaning of a statute (12 U.S.C. 24 Seventh) passed 75 years earlier, as applied to the banking and investment world of today. See *Cippollone* v. *Liggett Group*, 112 S. Ct. 2608, 2619 (1992); *United States* v. *Price*, 361 U.S. 304, 313 (1960).

insurance agents if it had thought, in 1916, that any national bank could already do so under Section 24 Seventh. See Pet. App. 7a. But the court of appeals swept too broadly in concluding that Section 92's reference to *some* "insurance" sales necessarily implied that national banks could have no power, independent of Section 92, to sell *any* "insurance" product. Section 92 permits national banks in small communities to act as agents for any "fire, life, or other insurance company." Under the interpretational principle of *ejusdem generis*, a general term in a statutory list should be understood in light of the specific terms that surround it.[22] *E.g.*, *Hughey* v. *United States*, 495 U.S. 411, 419 (1990); see also *Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 207, 218 (1984); *Beecham* v. *United States*, 114 S. Ct. 1669, 1671 (1994). In accordance with that principle, the Comptroller permissibly concluded that Section 92's grant of authority—and any concomitant implication that authority was otherwise lacking—should be construed to refer only to the unrestricted operation of a general agency for fire, life, or other casualty insurance, and not to agency sales of particular "insurance" products when the Comptroller has determined that such sales fall within or are incidental to the business of banking.[23]

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[22] Indeed, application of *ejusdem generis* is necessary to give significance to Congress's specification of "fire" and "life" insurance in Section 92. Under the court of appeals' reading of the statute those terms become unnecessary, because all types of insurance, including fire and life insurance, are encompassed in the phrase "any * * * insurance company."

[23] In its brief in opposition, respondent objected (at 9) to the Comptroller's reasoning on the ground that the words

The Comptroller's construction maintains an appropriate balance between Section 24 Seventh and Section 92. The general grant of powers in Section 24 Seventh permits banks to engage only in activities (including insurance agency activities) that are "incidental" to the "business of banking." Section 92, by contrast, grants banks located in small towns the *additional* authority to act as agents for the sale of a broader range of insurance products, *whether or not* such sales are incidental to the business of banking. That grant of additional authority does not negate the possibility that the sale of annuities, even if properly denominated as "insurance," is sufficiently related to the business of banking to come within the existing incidental powers of national banks. And the question whether such products, or any others, *are* so related is one within the expertise and competence of the Comptroller, not the courts.

* * * * *

In sum, Section 24 Seventh provides that national banks may exercise "all such incidental powers as shall be necessary to carry on the business of banking." It does not, however, define the "business of banking" or the powers that may be "incidental" thereto. Section 92 provides that national banks in small towns may act as the agent for "any fire, life,

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"fire, life, or other" in Section 92 describe only the type of company for which a covered bank may act as agent, not the types of insurance it may sell. The statute provides, however, that covered banks may "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums on policies issued by such company." The Comptroller could fairly read that language to limit both the types of companies and the types of "insurance" to which Congress intended the statute to apply.

or other insurance company" in the sale of insurance. Similarly, however, it does not specify to what types of "insurance" it refers. And neither provision speaks directly to the issue of whether a national bank may sell fixed and variable annuities as agent.

If "Congress has not directly addressed the precise question at issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. That construction need not be the only one those responsible for administration of the statute could have adopted, "or even the reading the court would have reached if the question initially had arisen in a judicial proceeding"; it need only be rationally permissible under the governing statute. *Id.* at 843 n.11. As demonstrated above and in the Comptroller's thorough opinion approving the application at issue here, there is ample support for the Comptroller's statutory interpretations in this case.

The regulation of banking is an area of prime importance, requiring a combination of special functional expertise and informed choices among sometimes conflicting goals. Those goals include both the maintenance of a strong banking industry in light of modern developments in investment and finance, and the protection of banks and bank customers from the expansion of bank activities into inappropriate areas. It would be difficult to identify a regulatory context in which it is clearer that courts should defer, in matters of statutory interpretation, to "reasonable accommodation[s] of conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). The reasonable statutory interpretations adopted by the Comptroller

in this case were thoroughly discussed and well supported in his decision, and they are entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1994

☆ U. S. GOVERNMENT PRINTING OFFICE; 1994 301157 86180

NationsBank Of North Carolina, N.A., et al.,
Petitioners,

v.

Variable Annuity Life Insurance Company, et al.
Respondents.

Eugene Ludwig, Comptroller Of The Currency, et al.
Petitioners,

v.

Variable Annuity Life Insurance Company, et al.
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the *Chevron* standard when it did not adopt the Comptroller's new construction of 12 U.S.C. § 24(7) or his new determination that annuities do not constitute "insurance" for purposes of 12 U.S.C. § 92, even though the Comptroller contradicted his prior construction of those statutes. (No. 93-1612)

2. Whether 12 U.S.C. § 92, which provides that, "in addition to" their other powers, national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company," impliedly bars national banks in more populous places from brokering annuities. (No. 93-1612)

3. Whether federal law permits national banks, wherever located, to act as agents in the sale of annuities. (No. 93-1613)

4. Whether the sale of annuity contracts is "necessary to carry on the business of banking" under 12 U.S.C. § 24(7).

DISCLOSURE OF CORPORATE PARENT

American General Corporation is the parent corporation of respondent, Variable Annuity Life Insurance Company.

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IN THE

Supreme Court of the United States

October Term, 1994

NationsBank Of North Carolina, N.A., *et al.*,
Petitioners,

v.

Variable Annuity Life Insurance Company,
Respondent.

Eugene Ludwig, Comptroller Of The Currency, *et al.*,
Petitioners,

v.

Variable Annuity Life Insurance Company,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT

COUNTER-STATEMENT OF THE CASE

This case concerns whether NationsBank, a national bank based in Charlotte, North Carolina, can sell annuity contracts through a subsidiary. R. 57-59.[1] As proposed by NationsBank, annuity purchasers could choose from a number of annuity options, in return for either a single or multiple premium. R. 13. Purchasers also could direct whether premiums are accumulated "solely in a variable account, solely in a fixed account or in a

[1] References to "R.___" herein are page references to the record on appeal to the court of appeals.

combination of variable and fixed accounts." *Id.* Purchasers could change this allocation prospectively and also "transfer all or a portion of the accumulated value of any annuity account to another annuity account." *Id.* Pay-out options would include the right to receive annuity payments "on a fixed or variable basis or partly on a fixed basis and partly on a variable basis." *Id.*

Annuities are a form of insurance that national banks in large towns cannot sell both because of the limitations imposed by 12 U.S.C. § 92, and because they have no authority to do so under 12 U.S.C. § 24(7).

A. 1863: Congress Establishes National Banks With Limited Powers

Congress established the national banking system in 1863, and specifically defined national bank powers in Section 11 of that legislation. Act of Feb. 25, 1863, ch. 58, § 11. 12 Stat. 668. The following year, Congress amended Section 11, Act of June 3, 1864, ch. 106, § 8, 13 Stat. 99, 101. That statute, codified at 12 U.S.C. § 24 (Seventh) ("Section 24(7)"), provides that national banks have the power:

> [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . . .

Fifty years later, the Federal Reserve Board considered whether a national bank could act as an agent or broker in the sale of insurance. Noting that the power to sell insurance is not specified in the statute, the Board determined that "writing insurance on commission is in no sense incidental to any of the

enumerated powers of a national bank." 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916).

B. 1916: Congress Grants Limited Authority To Small-Town National Banks To Act As Agent For Insurance Companies

The Comptroller of the Currency in 1916 agreed with the Federal Reserve Board that national banks have no power to sell insurance. 53 Cong. Rec. 11,001 (1916). To provide "small national banks" with additional revenue, Comptroller John Skelton Williams asked Congress to grant "limited" authority to national banks located in small "villages and towns" "to act as agents for insurance companies in the placing of policies of insurance." *Id.* He sought congressional action because "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." *Id.* Comptroller Williams observed that, under existing law, "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." *Id.*

Although he was wary of allowing banks "to trespass upon outside business naturally belonging to others," the Comptroller explained that the small amount of business generated at small town national banks would "not [be] likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.* Comptroller Williams pointedly advised Congress that "it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers." *Id.*

At the Comptroller's urging, Congress enacted 12 U.S.C. § 92 ("Section 92"), Act of Sept. 7, 1916, ch. 461, 39 Stat. 753, which provides that national banks:

> located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may . . . act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance . . . .

C. 1968: The Fifth Circuit Blocks Insurance Agency Activity By National Banks In Larger Towns

Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010, 1014 (5th Cir. 1968), construed Section 92 to "prohibit national banks from carrying on the business of insurance agents in places of more than 5,000 population." Applying the principle of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), *Saxon* reasoned that by conferring limited insurance agency powers upon small-town national banks, Congress "clear[ly]" intended to deny "any other power" for national banks to act as insurance agents. *Id.* at 1014, 1016. Noting the legislative genesis of Section 92, *Saxon* further explained that prior to enactment of the law, it was "universally understood that no national banks possessed *any* power to act as insurance agents." *Id.* at 1013 (emphasis in original). *Saxon* therefore rejected the assertion that national banks could act as insurance agents under 12 U.S.C. § 24(7).

D. 1978: The Comptroller Rules That Section 92 Bars The Sale Of Annuities By Large-Town National Banks

In an opinion letter dated June 16, 1978, the Comptroller ruled that a national bank's proposal to broker annuities as agent for an insurance company "would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. § 92." R. 7-8 (reproduced in Brief in Opp., at App. A). The Comptroller rejected the bank's attempt to evade Section 92 by characterizing its role as "fiduciary." The Comptroller observed that "in reality" "the bank is receiving [a fee] for the sale of insurance." *Id.*

A few years later, the Comptroller similarly ruled that Section 92 would prohibit a national bank from acting as agent in the sale of life insurance. OCC Interpretive Letter No. 241, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,405 (Mar. 26, 1982) ("OCC Ltr. 241"). The Comptroller explained (*id.* at 77,508):

> it is highly unlikely that a court would consider the activities of a national bank which acted as an agent in the sale of life insurance as incidental to banking under 12 U.S.C. § 24(7).

E. 1990: The Comptroller Reverses Himself On The Sale Of Annuities By National Banks

By letter dated March 21, 1990 (the "Approval"), the Comptroller approved NationsBank's proposal to sell annuities as agent for life insurance companies. The Approval conceded that "annuities have historically been a product of insurance companies" and that "annuities often share with insurance the need for actuarial calculations" of "mortality risk." NationsBank Pet. App. 38a-39a. To avoid the statutory limits on the insurance activities of national banks, the Comptroller renamed annuities, calling them "financial investment instruments." He then asserted that national banks have the inherent power to "broker a wide variety of financial investment instruments." *Id.* at 38a. The Comptroller added that fixed annuities are "similar to" variable annuities, which he previously had allowed national banks to broker. *Id.* at 39a; OCC Interpretive Letter No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,773-77 (Apr. 4, 1985) ("OCC Ltr. 331").

The Approval disagreed with *Saxon*'s holding that the limited "insurance agency power in Section 92 . . . negates the existence of any other power to act as an insurance agent." 399 F.2d at 1014; NationsBank Pet. App. 42a. The Approval also expressed "doubt[ ] that the word 'insurance' in Section 92 can

be construed to include annuities." *Id.* at 43a. The Approval never mentioned the Comptroller's 1978 conclusion that Section 92 bars national banks from selling annuities, except in small towns.

F. 1992: The Second Circuit Holds That Section 92 Bars Large-Town National Banks From Selling Title Insurance

American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993), construed Section 92 to prohibit national banks from selling title insurance, as agent, in towns with more than 5,000 inhabitants. Applying the *expressio unius* principle and examining the legislative genesis of Section 92, *American Land Title* agreed with *Saxon* that "had Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants." *Id.* at 155. The court held that the statutory phrase "*any* fire, life, or *other* insurance company" "makes inescapable the conclusion that Congress intended [Section 92] to apply to 'any . . . insurance company,'" including a title insurance company. *Id.* at 156 (emphasis in original).

G. Proceedings In The Courts Below

After VALIC brought suit challenging the Approval, the district court denied VALIC's motion for summary judgment and granted petitioners' cross-motions for summary judgment. *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991) (NationsBank Pet. App. 29a-34a). The court of appeals reversed. *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994) (NationsBank Pet. App. 1a-28a).

Finding that the language and legislative genesis of Section 92 establish Congress' meaning, the court of appeals reaffirmed

Saxon's holding that "under § 92 'national banks have no power to act as insurance agents in cities of over 5,000 population.'" NationsBank Pet. App. 6a, 10a. The court noted that when the intent of Congress is clear, deference to an administrative interpretation is not appropriate under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). NationsBank Pet. App. 9a (citing *Presley v. Etowah County Comm'r*, 112 S. Ct. 820 (1992)). The court also cited the 1992 ruling in *American Land Title Ass'n* that, as *Saxon* held (NationsBank Pet. App. 7a), "'had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants.'"

The court of appeals disagreed with the Comptroller's alternative contention that Section 92 does not apply because "annuities are not insurance." NationsBank Pet. App. 10a. The court observed that the Comptroller had conceded that "annuities have historically been a product of insurance companies" and that annuities are based on "actuarial calculations" of mortality risk. *Id.* at 10a, 13a n.4. The court reported that "[a]ll fifty states currently regulate annuities under their insurance laws." *Id.* at 11a. Since annuities transfer and distribute mortality risk, the court concluded that annuities are "insurance in the true sense of the term." *Id.* at 12a, n.3.

The court of appeals rejected the Comptroller's assertions that Section 92 does not limit the sale by national banks of "specialized" insurance products like annuities and that the selling of annuities is an "incidental power" granted to national banks under 12 U.S.C. § 24(7). Stressing Section 92's bar against large-town national banks serving as agents for "any . . . insurance company," the court refused to engage in the "arbitrary exercise of examining whether a particular type of insurance product conforms to a platonic form of 'general'

insurance." NationsBank Pet. App. 13a (quoting *American Land Title*, 968 F.2d at 156), 14a. The court of appeals also observed that the sale of annuities is not "necessary to carry on the business of banking" under Section 24(7), and even if it were necessary, the specific bar of Section 92 would control over that more general statute. *Id.* at 15a (citing *American Land Title*, 968 F.2d at 157).

The full court of appeals denied the petition for rehearing en banc, with four judges dissenting. NationsBank Pet. App. 19a. Six judges were recused, while one member of the panel was a senior judge and did not participate in the en banc process.

SUMMARY OF ARGUMENT

National banks may exercise only those powers that have been granted by Congress. The Comptroller's Approval of national bank sales of annuities violates the limitations in Section 92 and exceeds the authority granted by Section 24(7) of the National Bank Act.

Enacted in 1916, Section 92 granted insurance agency powers solely to national banks in small towns. That limited grant of powers includes a denial of such powers to national banks in larger communities. As embodied in the *expressio unius* principle, the structure of Section 92 denies to national banks those insurance agency powers not affirmatively granted. This construction of the statute is powerfully supported by the contemporaneous statements of the Federal Reserve Board and the Comptroller of the Currency, both of which concluded that national banks have no other insurance agency powers.

The language of Section 92 provides no basis for the Comptroller's distinction between "general" insurance agency activity and the sale of "specialized" insurance products like annuities, which the Comptroller claims that large-town national banks can handle. The Comptroller also demonstrates his lack

of experience with insurance when he claims that annuities are not insurance under Section 92.

Insurance experts have agreed throughout the nineteenth and twentieth centuries that annuities insure against the loss of income that often accompanies aging and retirement. Just as life insurance protects against the loss of income due to premature death, annuities protect against the loss of income due to the passage of time. Moreover, the Comptroller's emphasis on dictionary definitions of insurance as an "indemnity" is misplaced, because neither life insurance nor annuities are properly characterized as indemnities.

Both annuities and life insurance share the basic insurance characteristics of: (i) protecting against the loss of income (ii) by pooling contributions of many individuals and sharing mortality-based risks among them, and (iii) basing premiums and payouts on actuarial predictions of mortality.

State insurance law overwhelmingly agrees with the conclusion that annuities are insurance. Because of its traditional primacy in insurance regulation, state law is particularly significant here. When Section 92 was adopted, the statutes of 38 states defined the sale of annuities as part of the insurance business; today, 42 states specifically define annuities as insurance.

Section 24(7) presents a second barrier to the Comptroller's Approval. The sale of annuities cannot be found in any of the express powers granted to national banks by that statute. Indeed, the bank powers clause of Section 24(7) was based on the New York Free Banking Act of 1838, which was construed in 1857 not to grant state banks any powers to engage in insurance activities, including annuities. When Congress borrowed that provision in 1863 in the predecessor to Section 24(7), it necessarily adopted that construction for national banks as well.

Nor can the power to sell annuities be found in the grant of "such incidental powers as are necessary to the business of banking." That provision is not an elastic grant of whatever power might allow a national bank to enter a profitable new line of business; it gives authority only for those activities directly related to an express power of national banks.

The Comptroller has no support for his claim that annuities are a "financial investment instrument" of the type that national banks historically have brokered. The brokerage authority of national banks has been limited to generally marketable securities; there is no market for any individual's annuity. Accordingly, the sale of annuities is neither a traditional bank activity nor tied directly to any express banking power, and thus is not within Section 24(7). Even if the power to sell annuities could be found within Section 24(7), that general statute would be overridden by the specific prohibition in Section 92.

The Comptroller demands judicial deference for his views on these points, repeatedly citing *Chevron U.S.A. v. Natural Resources Defense Council*, *supra*, and similar cases. Fed. Br. 15, 23-24, 25, 37, 43. The NationsBank petitioners invoke *Chevron* no fewer than ten times. NationsBank Br. 14, 15, 16, 17, 22, 39, 40, 41, 42, 43, 45.

This clamor for judicial deference cannot conceal the Comptroller's failure to "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. The Comptroller's misapplication of *Chevron* is based on his failure to "employ[] traditional tools of statutory construction," *id.* at 843 n.9, including examining the statutory structure and language, considering the legislative genesis of both Section 92 and Section 24(7), reviewing the historical understanding of what annuities and insurance are, and applying the *expressio unius* principle. These "traditional tools of statutory construction" demonstrate that Congress intended to deny insurance agency

powers to national banks in larger communities. *Chevron* requires the Comptroller to "give[] effect" to that intent.

Just as fundamental, however, is the Comptroller's misunderstanding of the character of insurance and annuities, a misunderstanding that reflects his agency's lack of experience with insurance. The Comptroller has embraced concepts that have been rejected by his predecessors, by most state legislatures, by insurance scholars, and by this Court. Even at its most deferential, *Chevron* requires that a statutory interpretation be "rational and consistent with the statute." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987)). *Chevron* does not require deference to error.

ARGUMENT

I. SECTION 92 BARS NATIONAL BANKS FROM SELLING ANNUITIES IN TOWNS WITH POPULATION OVER 5,000

The Comptroller cites two grounds for rejecting the application of Section 92 to bar NationsBank's sale of annuities: (i) because Section 92 supposedly does not reach "specialized insurance products," and (ii) because he claims that annuities are not insurance. Both contentions are contrary to the congressional intent in Section 92 as determined by the traditional tools of statutory construction, and are not reasonable.

A. By Granting Certain Insurance Powers To National Banks In 1916, Congress Denied Any Other Insurance Powers

Our construction begins with the language of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991). Section 92 provides:

> In addition to the powers now vested by law in national banking associations . . . [,] any such asso-

> ciation located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may . . . act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance . . . .

By granting only to small-town national banks the specific power to serve as agent for an insurance company to sell insurance, the statute reflects the congressional intent that other national banks have no insurance agency powers.

The Comptroller concedes that "Section 92 carries some negative implication; Congress would have had little reason to grant small-town banks the power to act as general insurance agents if it had thought, in 1916, that any national bank could already do so under Section 24 Seventh." Fed. Br. at 40-41.

Petitioners argue that although Section 92 bars national banks in larger communities from "unrestricted operation of a general agency for fire, life or other casualty insurance," it allows the sale of "specialized" insurance products; they also suggest that the *expressio unius* principle somehow conflicts with *Chevron*. *See* Fed. Br. at 39-41; NationsBank Br. at 37-39. The first contention has no basis in Section 92; the second is wrong.

1. The Legislative Genesis of Section 92

The legislative genesis of Section 92, which petitioners largely ignore, establishes that Congress intended that only small-town national banks have any insurance agency powers. The Comptroller of the Currency and the Federal Reserve Board concluded in 1915 and 1916 that national banks had no authority, express or implied, to engage in insurance agency activities. *See* pp. 2-3, *supra*. Finding that "writing insurance on commission is in no sense incidental to any of the enumerated powers of a national bank," the Board wrote that "[a]ny such extension

of the powers of national banks must be left to the consideration of Congress." 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916).

One year later, Comptroller Williams heeded that advice and proposed enactment of Section 92. In his letter to Congress, the Comptroller affirmed that national banks had no power to act as insurance agents. 53 Cong. Rec. 11,001 (1916). Comptroller Williams asked Congress to grant some insurance agency powers to national banks, but stressed that this new authority "should be limited to banks in small communities" because those banks presented a case of special need. *Id.* Citing public policy concerns, Comptroller Williams pointedly stated (*id.*):

> I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores.

Comptroller Williams' explanation of the purposes of Section 92, which he drafted, must be accorded great weight in determining Congress' intent. *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982). Comptroller Williams' views are particularly significant both because they are the contemporaneous construction by the executive official charged with implementing the statute, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and because he "participated in developing the provision." *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

2. This Court Has Long Relied upon the *Expressio Unius* Principle

The Fifth Circuit's application of the *expressio unius* principle is solidly grounded in this Court's rulings. *United States v. Arredondo*, 6 Pet. (31 U.S.) 691, 725 (1832) (*Expressio unius*

"is an universal maxim in the construction of statutes"). Indeed, Congress is presumed to draft legislation so that strict application of the *expressio unius* rule will conform precisely to its will. *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (unanimous).

This Court has relied on the *expressio unius* principle in dozens of cases. *First Nat'l Bank v. National Exch. Bank*, 92 U.S. 122, 128 (1876), applied the principle to the incidental powers clause of Section 24(7), explaining that "[d]ealing in stocks is not expressly prohibited [to national banks]; but such a prohibition is implied from the failure to grant the power." *See also Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942) ("a legislative affirmative description implies denial of the non-described powers") (internal quotation marks omitted); *United States v. Sweeny*, 157 U.S. 281, 286 (1895); *Camp v. Gress*, 250 U.S. 308, 315 (1919) (Brandeis, J.).[2]

Nor is the Court's reliance on the *expressio unius* principle confined to ancient precedent. Two Terms ago, a unanimous Court employed the principle to reject a heightened pleading standard for civil rights cases alleging municipal liability. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993). *See also Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) (applying principle); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (by authorizing certain private lawsuits against Amtrak, Congress impli-

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[2] Other early cases in which the Court relied upon the *expressio unius* principle include: *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898); *Burck v. Taylor*, 152 U.S. 634, 648 (1894); *United States v. Erwin*, 147 U.S. 685 (1893); *United States v. County of Macon*, 99 U.S. 582, 590 (1879); *Arthur v. Cumming*, 91 U.S. 362, 364 (1876); *Pine Grove v. Talcott*, 19 Wall. (86 U.S.) 666, 674-75 (1874); *Sturges v. Draper*, 12 Wall. (79 U.S.) 19, 27 (1871); *Fanning v. Gregoire*, 16 How. (57 U.S.) 524 (1854); and *Wood v. United States*, 16 Pet. (41 U.S.) 342, 364 (1842) (Story, J.).

edly precluded other claims); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958) (applying *expressio unius*).

As one of the "traditional tools of statutory construction," the *expressio unius* principle should be employed under *Chevron*, and the court of appeals properly did so. Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829, 839 (1990) (endorsing *expressio unius* as useful tool under *Chevron* for ascertaining congressional intent).

3. The Comptroller May Not Redraft Section 92

Both *expressio unius* and the legislative genesis of Section 92 establish the Comptroller's error in viewing Section 92 as permitting the sale of "specialized" insurance products in larger towns. The Comptroller's contention finds no textual support in Section 92. The concepts of "general" and "specialized" insurance products are nowhere in the statute, which bars national banks from acting as agent for "any" insurance company in the sale of "insurance," whether it be termed "general" or "specialized." Indeed, the Comptroller offers no principled standard by which a "general" insurance product might be distinguished from a "specialized" product, except to assert that he has the authority to do so. Fed. Br. at 41.

Because he cannot base his argument on the text of the statute, the Comptroller proposes to redraft Section 92. Brandishing the maxim *ejusdem generis*, the Comptroller asserts that although the statute bars national banks from acting as agent for "any fire, life, or other insurance company," Congress really meant to say "fire, life, or other *general* insurance company." Fed. Br. at 41; *see also* NationsBank Br. at 46-47; NationsBank Pet. App. 43a. Redrafted in this manner, the Comptroller argues, Section 92 relates solely to "general" insurance companies and their products, and does not restrict national bank sales of

"particular" insurance products (like annuities) that he may decide are "incidental to the business of banking." *Id.*

The Comptroller's redrafting cannot succeed. The Comptroller and Congress understood in 1916 that national banks had no authority to sell any kind of insurance, *see* pp. 12-13, *supra*, and nothing in Section 92 vaguely resembles an affirmative grant of insurance powers to large-town banks.

Moreover, the adjectives "fire, life or other" modify the couplet "insurance company," not the single word "insurance." Although the word "insurance" appears later in the statute, it arises in a different clause and is not modified in any manner; "fire, life or other" modifies only "insurance company." Petitioners long have conceded that NationsBank is selling annuities as agent for "life insurance" companies. R. 53-55. Using the statutory language, NationsBank thus seeks to "act as the agent" for a "fire, *life* or other insurance company." Inserting "general" before "insurance company" would not help the Comptroller's argument at all.[3]

B. The Comptroller Erroneously Concluded That Annuities Are Not Insurance

The Comptroller concedes that "annuities have historically been a product of insurance companies" and that annuities, like conventional life insurance, typically possess an "element of mortality risk." NationsBank Pet. App. at 38a. The Comptroller ruled as recently as 1978 that the sale of annuities by a national bank "would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. § 92."

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[3] If the adjectives "fire" and "life" have any significance beyond mere recitation of two common examples of insurance companies, it is to illustrate that Congress intended for Section 92 to apply to all lines of insurance. That is, Section 92 applies not only to policies of indemnification (such as "fire" and other casualty insurance), but also to policies of insurance that pay a defined sum of money upon determinable contingencies (like "life" insurance and annuities). *See* pp. 21-23, *infra*.

R. 7-8 (reproduced at Brief in Opp. App. 1a). The Comptroller now insists that annuities are not insurance under Section 92. But as this Court repeatedly has stated, an agency interpretation of a statute "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).[4]

The Comptroller's reversal of position is based on his misunderstanding of annuities and insurance, upon a few incomplete dictionary definitions, and upon a smattering of case law which he misconstrues. Before according *Chevron* deference, this Court must employ "traditional tools of statutory construction" to determine whether the word "insurance" in Section 92 includes annuities. Even according deference, the Comptroller's conclusions are not rational or consistent with the statute and cannot be sustained.

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[4] The Comptroller attempts to dismiss his 1978 ruling as "informal advice by an agency lawyer," and advances the same rationale for avoiding his 1982 ruling that Section 92 prohibits national banks from selling life insurance. Fed. Br. at 38 n.19. This rationale is totally inconsistent with the Comptroller's reliance in his brief upon other opinions by OCC legal staff. *See, e.g.*, Fed. Br. at vii-viii (citing OCC Letter Nos. 271, 331 and 499); NationsBank Br. at viii-ix (citing OCC Letter Nos. 271, 331, 429 and 499). For example, petitioners rely on the Comptroller's 1985 decision to allow national banks to sell variable annuities (OCC Ltr. 331), *see* Fed. Br. at 7, 8, 28; that decision came in a letter by the Assistant Director of OCC's Legal Advisory Services Division, the same official who signed the Comptroller's 1978 and 1982 rulings on which we rely. Moreover, FDIC regulations treat all OCC legal opinions as authoritative, including those signed by the Assistant Director of the OCC's Legal Advisory Services Division. *See* 58 Fed. Reg. 64483 (Dec. 8, 1993) (state banks may rely on "any order or interpretation issued in writing" by OCC).

1. Annuities Are Insurance

The most traditional mode of statutory construction is to examine the meaning of the central terms according to historical context, common understanding, and the understanding of those terms in other legal settings. "Insurance," as used by Congress in 1916, included annuities.

After a brisk trot through a few dictionary definitions, the Comptroller announced his view that "annuities are not insurance" because they do not incorporate "the element of indemnification against risk." NationsBank Pet. App. 44a-45a; *see id.* 47a (annuities "lack the basic insurance characteristic of indemnification against risk"); Fed. Br. 25. But the Comptroller ignores the risk against which annuities insure, and indemnification is not the sole hallmark of insurance.[5]

Insurance scholars largely agree that annuities are insurance, stressing that annuities insure against the loss of income that may accompany aging and retirement. One work states succinctly: "The annuity is true life insurance. It is insurance against living too long — against outliving one's ability to provide an income for himself." Robert I. Mehr *et al.*, *Principles of Insurance* 538 (4th ed. 1966). Another recent text also defines annuities as insurance, explaining that annuities "protect against the possibility of outliving one's income." Kenneth Black, Jr. & Harold D. Skipper, Jr., *Life Insurance* 147-48 (12th ed. 1994); *see* Frederick G. Crane, *Insurance Principles and Practices* 254 (2d ed. 1984) ("life annuities are a form of insurance").

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[5] Had he read his dictionaries more carefully, the Comptroller might have avoided this error. The most recent volume of *Black's Law Dictionary* (6th ed. 1990) includes the definition of "annuity policy" as "An insurance policy providing for monthly or periodic payments to insured to begin at fixed date and continue through insured's life". *Id.* at 90; *see id.* at 802 ("annuity insurance" is an "insurance contract calling for periodic payments to the insured or annuitant for a stated period or for life").

Broadly defined, insurance is a "formal social device for reducing risk by combining exposures." *Glossary of Insurance Terms* 77 (Robert W. Osler and John S. Bickley, eds., 1972); *see also* John R. Ingrisano & Corinne M. Ingrisano, *The Insurance Dictionary* 152 (3d ed. 1990) (defining insurance as a "[p]rotection, through specified money compensation or reimbursement for loss provided by written contract against the happening of specified chance or unexpected events"). As this Court explained in *Helvering v. Le Gierse*, 312 U.S. 531, 539 (1941), "risk-shifting and risk-distributing" are the hallmarks of insurance. *See* H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943) (McCarran-Ferguson Act) (insurance is "the distribution of risk according to hazard, experience, and the law of averages"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220-21 (1979). The nature of the risk assumed determines the kind of insurance involved.

Life insurance is a "contractual system of risk-sharing under which contributions are accumulated and redistributed to meet the economic consequences of the uncertain duration of life." *Merritt Glossary of Insurance Terms* 117 (Thomas E. Green 5th ed. 1993). Some state statutes define life insurance to include contracts "conditioned upon the continuance or cessation of human life." *See, e.g.*, Miss. Code Ann. § 83-19-1(j) (1993); N.C. Gen. Stat. § 58-58-1 (1991); Tex. Ins. Code Ann., art. 3.01, § 1 (1994). That statutory formulation illustrates how annuities properly are viewed both as a type of life insurance and as the "opposite" of conventional life insurance. Annuities insure the risks of long life ("continuance" of human life), while conventional life insurance insures the risk of brief life ("cessation" of life).

A leading text explains the relationship between annuities and conventional life insurance, and why annuities are insurance (*McGill's Life Insurance* 109-10 (Edward E. Graves & Lynn Hayes, eds., 1994) (emphasis in original):

> The primary function of life insurance is to *create* an estate or principal sum; the primary function of an annuity is to *liquidate* a principal sum, regardless of how it was created. Despite this basic dissimilarity in function, life insurance and annuities are based on the same fundamental pooling, mortality and investment principles.
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> In the first place, both life insurance and annuities protect against loss of income. Life insurance furnishes protection against loss of income arising out of premature death; an annuity provides protection against loss of income arising out of excessive longevity. It might be said that life insurance provides a financial hedge against dying too soon, while an annuity provides a hedge against living too long. From an economic standpoint, both contingencies are undesirable. A second common feature is the utilization of the pooling technique. Insurance is a pooling arrangement whereby all make contributions so that the dependents of those who die prematurely are partially compensated for loss of income; an annuity is a pooling arrangement whereby those who die prematurely make a contribution on behalf of those who live beyond their life expectancy and would otherwise outlive their income. A third common feature is that the contributions in each case are based on probabilities of death and survival as reflected in a mortality table.... Finally, under both arrangements, contributions are discounted for the compound interest that the insurance company will earn on them.

See Black & Skipper, *supra*, at 149; ("annuities are simply another type of insurance, and both life insurance and annuities are based on the same fundamental principles"); Crane, *supra*, at 251 (annuities and life insurance both "are based on the law

of large numbers, both are insurance, and the rates for both are based on average mortality rates").

Thus, while annuities and conventional life insurance both involve the transfer and distribution of mortality risk, they approach that risk from opposite directions (William R. Vance, *Handbook on the Law of Insurance* 32 n.24 (3d ed. 1951) (citing Hardy, *Risk and Risk-Bearing* 67 (1931)):

> [T]he uncertainty of the length of human life . . . takes two forms — the risk that one may live so long as to use up the funds which he has provided to support himself in old age and the risk that he may die before the end of his normal working life. Each contingency needs to be provided against.[6]

The Comptroller relies on dictionary definitions that stress the concept of indemnity, a feature of property or casualty insurance. But that reliance ignores the plain fact that some types of insurance — life insurance and annuities — are not indemnities. As *McGill's Life Insurance* observes (*supra*, at 752), "A life insurance policy therefore is not a contract of indemnity, but one to pay a stated sum." *See* Vance, *supra*, at 106 (life insurance "in no way resembles a contract of indemnity"); 43 Am. Jur. *Insurance*, § 3 (1982) ("contract of life insurance is not one of indemnity, but is an absolute engagement to pay a certain sum at the end of a definite or indefinite time").

Indemnification entails providing a "security against hurt, loss, or damage." *Webster's Tenth New Collegiate Dictionary* 591 (1993). In the case of fire or property insurance, the insurer indemnifies the risk that a loss may take place within a given term. A specific insured may not experience any loss, or any

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[6] It makes no difference whether a particular annuity contract takes the form of an immediate annuity, where the payments to the annuitant begin immediately, or a deferred annuity, where the insurer's payments are delayed until an agreed-upon date. The insurance company assumes a mortality risk at the inception of either contract. *See also* n. 12, *infra*.

loss may be small, but the insurance company takes the risk that the total actual losses will be more or less than the premiums paid plus investment income. In the case of life insurance, however, the event upon which payment is to be made is certain to occur. As one authority explains, the certainty of death (Vance, (3d ed.), at 105):

> introduces into this contract of life insurance a predominant element of speculative investment. The presence of this element necessarily precludes the application of the principle of strict indemnity, since, as is easily seen, in the average case the insurer only pays back the money that has been given to him to hold in quasi trust for the insured plus interest and less expenses.

Second, life insurance is not a contract of indemnity because of "the difficulty to be encountered in fixing any sort of pecuniary value upon life." *Id.* at 106. The insured "might be one whose life was rather a burden upon the [beneficiary] than a benefit possessing a pecuniary value." *Id.* In contrast, the loss from a burned-down building can be quantified far more objectively. *See McGill's Life Insurance*, *supra*, at 752 (life insurance is not indemnity because "the value of a person's life to that person is without limit, [so] no sum payable upon his or her death will be in excess of the loss suffered").[7]

For over one hundred years, this Court has recognized that life insurance is not a pure indemnity, but is simply a contract "to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen." *Central Nat'l Bank of Washington v. Hume*, 128 U.S. 195, 205 (1888). *See also Grigsby v. Russell*, 222 U.S. 149, 156 (1911) (Holmes, J.) (view

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[7] The practical effect of life insurance not being an indemnity is that subrogation does not apply to life insurance policies. Accordingly, a life insurer cannot be subrogated to a claim by the decedent's estate that death was caused by the negligence of a third party.

that life insurance is contract of indemnity "long has disappeared"). As explained in *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. (80 U.S.) 616, 619 (1871) (citing *Dalby v. India & London Life Assurance Co.*, 15 C.B. 365 (1854)):

> Life insurances have sometimes been construed [as contracts of indemnity], but the better opinion is that the decided cases which proceed [in this fashion] are founded in an erroneous view of the nature of the contract. . . . Insurers in such a policy contract to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appears that the stipulated event has happened . . . as the contract is not merely for an indemnity, as in marine and fire policies.

Annuities are the same. After the annuitant has paid the stipulated premium or premiums (during the accumulation phase), the insurance company pays a certain sum to the annuitant so long as he or she is still living (the "stipulated event"). The statutes of twenty-three states define insurance as contracts providing for payments upon "determinable contingencies," a formulation that includes both indemnity and non-indemnity insurance. *See* Appendix A, *infra*.

The different purposes for annuities and conventional life insurance — one insuring against long life and the other against premature death — largely explain the court rulings inaptly cited by the Comptroller to support his theory that annuities are not insurance. *See* NationsBank Pet. App. 45a; *see also* Fed. Br. at 36, NationsBank Br. at 42.

Helvering v. Le Gierse and *Estate of Keller v. Commissioner*, 312 U.S. 543 (1941), did not consider whether annuities are insurance. Rather, those cases held that proceeds from a life insurance policy did not qualify for exclusion as "insurance" from decedent's gross estate for federal tax purposes. The life

insurance was purchased simultaneously with annuities, within a month of impending death, as part of a scheme to avoid estate taxes. The mortality risk of the life insurance policies and the annuities, being opposites, "counteracted each other" so no real risk was transferred. *Le Gierse*, 312 U.S. at 541. This Court's refusal to be taken in by tax avoidance schemes certainly does not establish that annuities are not "insurance" under Section 92. *See In re Rhodes' Estate*, 197 Misc. 232 (N.Y. Surr. Ct. 1949) (same; "death benefit" component of annuity contract did not qualify for insurance tax exclusion because mortality risk was offset by annuity component). In fact, by holding that the mortality risk of annuities "counteracted" the mortality risk of life insurance, *Le Gierse* acknowledged that annuities do involve the assumption of mortality risk.[8]

Similarly, *Kernochan v. United States*, 29 F. Supp. 860 (Ct. Cl. 1939), *cert. denied*, 309 U.S. 675 (1940), did not hold that annuities are not insurance. *Kernochan* held that a widow's "refund" of the decedent's payments into a retirement fund did not qualify for exclusion from his estate as life insurance. *Accord In re Southern's Estate*, 257 A.D. 574, 576 (1939) (noting that "joint survivorship annuity" would qualify as insurance).[9] *In re Walsh*, 19 F. Supp. 567, 572 (D. Minn. 1937),

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[8] A number of federal tax statutes define annuities to be insurance. *See* 26 U.S.C. § 816(a) ("life insurance company" defined as "an insurance company which engages in the business of issuing life insurance and annuity contracts"); 26 U.S.C. § 408(b) ("individual retirement annuity" defined as "an annuity contract . . . issued by an insurance company"); 26 U.S.C. § 501(m)(4) ("[f]or purposes of this subsection, the issuance of annuity contracts shall be treated as providing insurance"); 26 U.S.C. § 814(b) ("insurance contract" defined to include "annuity contract").

[9] The Comptroller cites several other decisions involving interpretation of state tax laws. *See People ex rel. Metropolitan Life Ins. Co. v. Knapp*, 193 A.D. 413 (1920); *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510 (1916); *Daniel v. Life Ins. Co.*, 102 S.W.2d 256 (Tex. Civ. App. 1937); and *State ex. rel. Equitable Life Assurance Soc'y v. Ham*, 54 Wyo. 148 (1939); *see also Corporation Comm'n v. Equitable Life Assurance Soc'y*, 73 Ariz. 171 (1951).

held that an annuity did not qualify for a life insurance exclusion because the "primary purpose" of the exclusion was to protect the beneficiaries of life insurance policies. Because annuities primarily benefit the insureds, the exclusion did not apply.

2. When Section 92 Was Enacted, Annuities Uniformly Were Understood to Be Insurance

A second traditional tool of statutory construction is to examine the common understanding of a disputed term at the time the statute was enacted. While construing "insurance" in the McCarran-Ferguson Act, this Court observed that the "contemporary perception" of the meaning of insurance "is highly significant in ascertaining congressional intent." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 227 (1979). Accordingly, it is "highly significant" that annuities were understood in 1916 to be a product of a "fire, life, or other insurance company" involving the sale of "insurance." The Comptroller has never addressed this question.

Each of these cases held that the annuity "premiums" received by insurance companies were not taxable under state law as premiums of insurance. As the Comptroller has cautioned, however, the tax treatment of annuities is not necessarily meaningful in determining whether annuities are insurance. Fed. Pet. at 12, n.4. The special tax treatment of annuity premiums has been codified in the Internal Revenue Code, without affecting other provisions of the federal tax code that define annuities as insurance. *See* 26 U.S.C. §§ 805(a)(2), 807(b),(c)(1), 816(b)(1) (annuity premiums reserved for future payment not taxed). In any event, the cases cited by the Comptroller reflect a minority view of the narrow state tax issue presented, and were aptly criticized in *Bankers Life Ins. Co. v. Laughlin*, 160 Neb. 480 (1955) (collecting contrary authorities from Iowa, New Hampshire, Missouri, Massachusetts, Arkansas, Kansas, California, and Mississippi).

a. Annuities Have Been Viewed as Insurance since the Origin of the Life Insurance Business

Annuities have been part of the insurance business for hundreds of years. *See SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 81 (1959) (Brennan, J., concurring) ("the granting of annuities has been considered part of the business of life insurance"). Indeed, life insurance and annuities have been sold by life insurance companies since the first insurers were established in England and in this country.

The first insurance company in England was founded in 1698 as "a widow's fund, an annuity scheme." 1 Joseph A. Joyce, *A Treatise on the Law of Insurance of Every Kind* 43 (2d ed. 1917). The creation of corporations in America with the power both "to insure lives and grant annuities" dates back to before the Revolution. George Richards, *A Treatise on the Law of Insurance* 17 (3d ed. 1909). Founded in the 1760s for the benefit of Protestant clergy, the first chartered insurance companies in this country offered annuities. Joyce, *supra*, at 44-45. Life insurance "at the time of its original introduction" took two forms: ordinary whole life insurance and the granting of annuities. J. H. James, *A Practical Treatise on Life and Fire Assurance; Annuities and Reversionary Sums; and Leases for Terms and For Lives* 24 (London, Doughty & Co. 1868).

Throughout the nineteenth century, annuities were understood to be part of the insurance business. In 1812, Pennsylvania granted a charter to the Pennsylvania Company for the Insurance on Lives and Granting Annuities, "the first North American insurer organized for the sole purpose of selling life insurance and annuities to the general public." Black & Skipper, *supra*, at 53. A leading commentator wrote in 1868 that annuities are a form of life insurance. James, *supra*, at 28.

Several varieties of annuities developed during the 1800s. J. H. James in 1868 reported the availability of (i) "survivorship

annuities" ("payable to one person on the death of another"), (ii) "deferred annuities" ("payable on and after the attainment of a given age"), (iii) "immediate annuities," and (iv) annuities with refund features ("annuity-assurances") ("a yearly allowance is made to the purchaser during life, and an agreed portion of the deposit is returned ... on death").[10] James characterized all of these annuities as "Life Assurance." *Id.* at 24-29. *See also* Joseph K. Angell, *A Treatise on the Law of Fire and Life Insurance* xi, 303-04 n.2 (Boston, Little, Brown & Co. 1854) (describing immediate, deferred and survivorship annuities as "official forms" of life insurance).[11]

Annuities were still regarded as insurance in the years immediately preceding enactment of Section 92. A leading 1915 textbook classified annuities as one "leading group[]" of life insurance. Solomon S. Huebner, *Life Insurance* 47, 58 (1915). Professor Huebner observed that annuities protect against the "hazard" of outliving one's income, and are based on the same principles as conventional life insurance. *Id.* at 111. *Accord* Lester W. Zartman and William H. Price, *Life Insurance* 278 (1914) ("function of life insurance is to protect the family and to provide . . . for old age"). He described various kinds of then-current annuities, including immediate annuities, deferred annuities, life annuities, term annuities, single premium annuities, level premium annuities, joint survivor annuities, and annuities with refund features. Huebner, *supra*, at 58-59; *see* A. Fingland Jack, *An Introduction to the History of Life Assurance* 165 (1912) (annuity contract "certainly is life assurance");

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10 Mr. James claimed that he invented refund annuities.

11 Annuities always have been paired and associated with life insurance, especially in the context of state insurance statutes. *See* pp. 29-30, *infra*. Applying the principle *noscitur a sociis* ("a word is known by the company it keeps"), annuities should be deemed a form of life insurance. *See, e.g.*, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying principle).

William A. Kerr, *The Law of Insurance* 12-13 (1902) (defining "insurance" to include annuities).

The Comptroller thus erred when he claimed that deferred annuities and refund annuities are "modern" and "contemporary" inventions that are "even less like insurance" than the "classic immediate-payout, lifetime-based fixed annuity." Fed. Br. at 28-34. There is nothing "modern" about deferred annuities or refund annuities, which insurers had been selling for more than fifty years when Congress enacted Section 92. Like so-called "classic" annuities, these products uniformly were considered to be insurance.[12]

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[12] Part of the Comptroller's confusion regarding "modern" annuities may be due to his slavish reliance upon a single source, David Shapiro and Thomas Streiff, *Annuities* (1992), which is cited sixteen times in his brief. That 113-page volume was written by two financial planners and is intended primarily to provide "information on how to position and market annuities." *Id.* at iii, ix. It makes no pretense of being a scholarly work, but is principally a marketing manual. Indeed, the book commits serious historical errors. For example, the authors assert that before the 1970s "annuities had no provision for liquidity or other cash benefits other than annuitization," *id.* at 6, even though refund annuities were available one hundred years earlier. *See* pp. 26-27, *supra.*

The Comptroller also misunderstands refund annuities generally. He claims that because a refund annuity may return the principal if the purchaser dies during the payout phase, it "eliminate[s] any mortality risk on the part of the purchaser" Fed. Br. at 34, and is therefore not insurance. This assertion turns the basic concept of insurance on its head. The purchaser of insurance, including a refund annuity, wishes to transfer as much mortality risk to the insurer as possible. The function of insurance is to "reduc[e] risk by combining exposures," *Glossary of Insurance Terms, supra,* at 77, which a refund annuity achieves admirably. The issuer of the refund annuity assumes from the purchaser both types of mortality risk: early death and long life. The Comptroller's "critique" of refund annuities establishes that they are insurance.

The Comptroller also errs when he claims there is "no mortality risk" in hypothetical deferred annuities that offer the option, at the end of an accumulation period, to take a lump sum payment, or the option for fixed payments for a term certain, or the option for "systematic withdrawals"

b. The States in 1916 Considered Annuities to Be Insurance

In the years prior to 1916, most state law also recognized that annuities are insurance. By 1916, eighty percent of the States (38 of 48 states) had enacted statutes declaring that the business of insurance included the granting of annuities. See Appendix B, *infra* (listing state statutes).

The first general law in New York for incorporating insurance companies gave insurance companies the power "to make insurance upon the health or lives of individuals and every insurance appertaining thereto or connected with health or life risks, and to grant, purchase, or dispose of annuities." 1849 N.Y. Laws ch. 308, § 1; *see also* 1850 Wis. Laws ch. 232, § 1. California, like many other states, expressly classified annuities as a form of life insurance. 1915 Cal. Stat. ch. 768, § 1. *See, e.g.*, Ariz. Rev. Stat. § 3428(2) (1913); 1899 Ind. Acts ch. 28, § 1; 1893 Ky. Acts ch. 171, § 106; 1869 Mich. Pub. Acts 77, § 1; 1913 Neb. Laws ch. 154, § 78; 1872 Ohio Laws 150 ch. 2, § 1; 1875 Tenn. Pub. Acts ch. 142, § 10; 1909 Tex. Gen. Laws ch. 108, § 1; 1913 Wash. Sess. Laws ch. 109, § 2.

The contemporaneous views of the States are particularly critical to understanding the meaning of "insurance" in Section 92 because state law has predominated in insurance matters. After this Court held that the regulation of insurance was outside Congress' constitutional authority, *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 183 (1869), "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978).[13] As this Court

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through death of the purchaser. Fed. Br. at 34. So long as one of the options offered in an annuity includes a benefit defined by the purchaser's life, the issuer assumes mortality risk from the moment the contract is signed. That mortality risk will be relieved if the purchaser exercises a withdrawal option, for example, but would have been present for the entire preceding period.

[13] State regulation of insurance remains paramount despite this Court's 1944 ruling that insurance is in interstate commerce and subject to federal

recognized in *SEC v. VALIC*, "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition." 359 U.S. at 68-69. In contrast, the Comptroller has virtually no experience with insurance or annuities.

The States overwhelmingly continue to provide that annuities are insurance. As the court of appeals observed, "[a]ll fifty states currently regulate annuities under their insurance laws." NationsBank Pet. App. 11a (collecting authorities). Forty-two states currently have statutes expressly defining annuities as insurance, as a kind of insurance, or as life insurance. *See* Appendix A, *infra* (listing state statutes).

3. Like Life Insurance, Annuities Have Some Investment Function

The Comptroller insists that annuities are not insurance because "they are primarily a vehicle for investment." NationsBank Pet. App. 45a; *see also* Fed. Br. at 34-37; NationsBank Br. at 41-42. The presence of an investment feature in annuities is not inconsistent with its character as insurance. Justice Holmes wrote that "life insurance has become in our days one of the best recognized forms of investment and self-compelled saving." *Grigsby v. Russell*, 222 U.S. 149, 156 (1911). Several years earlier, Professor Vance observed that life insurance "is not now confined to mere insurance against the risks and accidents of life, but also includes, as perhaps its most important element, the feature of investment." William R. Vance, *Handbook of the Law of Insurance* 16 (1904). Vance emphasized the dual nature of life insurance: the pooling of mortality risk and the "investment of savings." *Id.* at 16-17.

Most life insurance policies have significant investment components. Traditional whole life insurance has many invest-

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jurisdiction. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). After that decision, Congress swiftly adopted the McCarran-Ferguson Act, 59 Stat. 34 (1945), to "restore the supremacy of the States in the realm of insurance." *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993).

ment features, yet it is undeniably insurance.[14] *See* OCC Ltr. No. 241; Vance, (3d ed.), *supra*, at 105 (life insurance has a "predominant element of speculative investment"). Albert H. Mowbray *et al.*, *Insurance* 307 (6th ed. 1969) ("All basic [life insurance] policies other than term insurance include a savings or investment component"). That an insurance product also performs some investment function cannot mean that the product is not insurance under Section 92.[15]

4. All of NationsBank's Annuities Are Insurance

The annuities to be sold by NationsBank include the right to select either a fixed annuity, or a variable annuity, or some combination of fixed and variable features. NationsBank Pet. App. 35a. All of NationsBank's annuities are insurance under Section 92 because, applying the criteria developed by insurance experts, (i) they protect against the loss of income due to long life, (ii) they pool the contributions of many individuals and share the mortality-based risks among them, and (iii) their premiums and payouts are based on actuarial predictions of mortality.[16]

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14 One such "investment" feature of traditional whole life insurance is the steady accumulation of cash value, upon which the insurer pays interest or dividends. *See* IV Loss, *Securities Regulation* 2534 (supp. ed. 1969) (defining "continuous spectrum" from pure insurance through pure investment, where "straight life" and "annuities" are toward the center).

15 The NationsBank petitioners mistakenly suggest that *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), supports their view that annuities are not insurance. NationsBank Br. at 44. That case held only that certain aspects of a group annuity contract did not qualify as a "guaranteed benefit policy" under the Employee Retirement Income Security Act of 1974 (ERISA). *John Hancock* did not consider whether annuities are insurance.

16 The Comptroller complains that annuities for a term certain (that is, not tied to the span of any individual's life), lack mortality risk and should not be deemed insurance. Fed. Br. at 34. Both the insurance industry and insurance regulators treat such annuities as insurance, but the question of their true nature is not before this Court. NationsBank has not proposed to sell term certain annuities.

The fixed annuity options offered by NationsBank are plainly insurance. In two cases construing federal securities laws, this Court confirmed the traditional view that fixed annuity contracts are insurance. *See SEC v. VALIC*, 359 U.S. at 69; *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 206 (1967). Thus, so long as a fixed annuity is one of the options available to NationsBank's annuity purchasers, the product is insurance and NationsBank cannot sell it. Although the Comptroller offers misleading statistics evidently designed to imply that fixed annuities are a trivial portion of the market, *see* Fed. Br. at 33 n.16, the financial planner's manual cited by the Comptroller reports that between 75 and 85 percent of annuity purchases are "fixed annuities." Shapiro and Streiff, *supra*, at 50.

This Court's recognition that fixed annuities are insurance also applies to the fixed annuity component of the combination fixed-variable annuities that NationsBank wishes to sell. *United Benefit*, at 206 ("provisions dealing with operation of the fixed-payment annuity were purely conventional insurance provisions"). Indeed, *United Benefit* involved a mixed annuity product (the "Flexible Fund") like some of those NationsBank seeks to sell. The fixed annuity component of combination annuities is certainly insurance under Section 92, so NationsBank cannot sell those, either.

Many variable annuities, in fact, guarantee a minimum return that operates like a fixed annuity. *See, e.g.*, R. 14 (NationsBank concedes that variable annuities "frequently . . . guarantee[] minimum investment return"). The Comptroller has admitted that fixed and variable annuities are "similar" and that "[b]oth can offer the investor a stream of payments extending over his life, and both may involve actuarial calculations." NationsBank Pet. App. 39a. *See also SEC v. VALIC*, 359 U.S. at 70 ("actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles"). The Comptroller has stated that the "only" difference is that fixed annuities

"offer a reduced level of risk," but the guaranteed return component of a variable annuity functions like a fixed annuity and is insurance under Section 92.

As the Comptroller concedes, many variable annuities also have a fixed payout. Fed. Br. 6. The mortality risk of those annuities plainly establishes that they are insurance. During the accumulation period, the purchaser's premiums are used to purchase "accumulation units" of the specified investment program. When the contract converts to the payout phase, the accumulation units are converted to annuity units. The value of the annuity units, which determines the size of the future payments to the annuitant, is based both on the value of the assets in the variable annuity account and on mortality expectations for the annuitant. *McGill's Life Insurance*, *supra*, at 123; Black & Skipper, *supra*, at 159-60; Mehr *et al.*, *supra*, at 409. The issuer assumes the mortality risk of having to make extra payments to long-lived purchasers beyond the value of the premiums paid plus investment earnings. A further element of mortality risk arises because most variable annuities "have some form of death benefit," Shapiro & Streiff, *supra*, at 60, requiring the return upon death of premiums paid regardless of the performance of the purchaser's variable annuity account.

Finally, even a pure variable annuity with a variable payout incorporates mortality risk when the accumulation units are converted to annuity units, and if there is a death benefit. These annuities, too, are insurance.

Although variable annuities were not developed until the 1950s, annuities already were widely differentiated by the time Section 92 was enacted in 1916. *See* pp. 26-27, *supra*. There is no reason to conclude that Congress in 1916 would have wanted to allow national banks to sell this newer variety of annuity any more than the many other varieties (*e.g.*, deferred annuities, refund annuities) then understood to be insurance. Moreover, variable annuities continue to be regulated as insur-

ance by the states. *See, e.g.*, Del. Code Ann. tit.18, §§ 1701(a), 1715 (a)(2) (1993); Fla. Stat. Ann. § 624.602(1) (West 1993); Neb. Rev. Stat. § 44-201 (3)(1990 supp.); N.H. Rev. Stat. Ann. § 401:1 (III)(1993 supp.); Or. Rev. Stat. § 731.154 (1993); Black & Skipper, *supra*, at 160.

Citing *SEC v. VALIC* and *United Benefit*, the Comptroller protests that variable annuities cannot be considered insurance under Section 92 since they have been deemed "securities" for purposes of federal securities regulation. *See* OCC Ltr. No. 331. Those cases did not hold that variable annuities are not "insurance," *per se*, nor did the Court find that "insurance" and "securities" are mutually exclusive terms. *See SEC v. VALIC*, 359 U.S. at 80-81 (Brennan, J., concurring) (variable annuities "[o]bviously . . . have elements of conventional insurance").

SEC v. VALIC and *United Benefit* held only that variable annuities do not qualify for the exemption from securities registration which Congress provided for "insurance" and "annuity contract[s]". The Court stressed that variable annuity contracts, regardless of their mortality risk, include some investment risk for the purchaser, since his return will vary according to the performance of the investments. Consequently, a variable annuity purchaser is entitled to disclosure of the insurer's investment policies through registration under the Securities Act of 1933. *SEC v. VALIC*, 359 U.S. at 77 (Brennan, J., concurring); *United Benefit*, 387 U.S. at 210. That holding is entirely consistent with the conclusion that because variable annuities include the pooling and spreading of mortality risk, they are "insurance" that national banks may not sell under Section 92.

This conclusion is reinforced by the regulatory treatment of "variable life insurance" (VLI), which provides both a guaranteed minimum death benefit plus a further death benefit determined on the basis of the performance of the specific investments made with the premiums paid. Black & Skipper, *supra*, at 114-17. The potential fluctuation of the additional

death benefit has prompted application of the federal securities laws to VLI policies to ensure that purchasers are informed concerning the controlling investment policies. *Id.* Nevertheless, VLI policies, like variable annuities, include mortality risk which is pooled and spread, and they are insurance.

II. SECTION 24(7) DOES NOT AUTHORIZE NATIONAL BANKS TO SELL ANNUITIES

Americans have engaged in numerous disputes over the proper powers of banks in a democracy. *e.g., M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). Passions have run high on issues such as the First and Second Banks of the United States, both of which expired due to political opposition.[17] Bank failures often have triggered political reactions based on a mistrust of the concentrated economic power of banks. Only the bank panics of the late 19th and early 20th century overcame political opposition to the establishment of the Federal Reserve System, while the Great Crash of 1929 prompted the imposition of new restrictions on the scope of bank activities. *See* James J. White, *Banking Law*, 23-34 (1976); William Greider, *Secrets of the Temple*, 271-75 (1987).

The bank powers clause of Section 24(7) should be understood in the context of that history. The statute does not make a broad grant of powers to banks, but lists five specific powers: (i) discounting and negotiating promissory notes, drafts, bills of

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[17] In reflecting on the Second Bank of the United States, then-Chief Justice Taney wrote in 1845 that "the overthrow of *the Monster* was the greatest of all the public services of Genl. [Andrew] Jackson." R.B. Taney to Ellis Lewis, Oct. 25, 1845, *reprinted in* Carl B. Swisher, 5 *History of the Supreme Court of the United States: The Taney Period, 1836-64*, 127 (1974) (emphasis in original). If the bank had survived, Taney warned, "that corporation would at this day have been virtually governing the country; — corrupting its councils — & directing the operations of the government as might best suit the cupidity or ambition of those at the head of the corporation." *Id.*

exchange, and other evidences of debt; (ii) receiving deposits, (iii) buying and selling exchange, coin, and bullion, (iv) loaning money on personal security, and (v) obtaining, issuing, and circulating notes. As the Comptroller tacitly acknowledges, the sale of annuities fits within none of those specific powers.

Consequently, the Comptroller proposes an expansive reading of the statute's grant of "such incidental powers as shall be necessary to carry on the business of banking," and points to a supposed tradition of brokering "financial investment instruments." The statutory language supports neither proposition, both of which challenge over 150 years of limited national bank powers. Demanding *Chevron* deference yet again, petitioners argue that the "business of banking" has "evolv[ed]" into the business of "provid[ing] retail financial services." NationsBank Br. at 17-18; Fed. Br. at 23. Competitive pressures in the "dynamic financial services marketplace," they contend, have forced the Comptroller to permit "new and expanded activities not explicitly granted by Congress." *Id.*

The traditional tools of statutory construction, however, refute the Comptroller's position. The legislative genesis of Section 24(7) demonstrates that Congress intended to grant only limited powers to national banks, and the "business of banking" does not include the sale of annuities.

A. When Congress Enacted Section 24(7), It Conferred Limited Powers Upon National Banks

1. The New York Free Banking Act of 1838 Denied Banks the Power to Sell Annuities

As enacted in 1863, Section 24(7) was modeled on Section 18 of New York's Free Banking Law of 1838.[18] Petitioners

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[18] The New York Free Banking Act provided (1838 N.Y. Laws 245, 249, ch. 260, § 18):

> Such association shall have power to carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving

correctly observe that early decisions construing the New York statute are an important indicator of Congress' intent in enacting Section 24(7). Fed. Br. at 17; NationsBank Br. at 30 n.18.

The definition of bank powers in the New York Free Banking Act closely tracked individual banking charters in New York, which specified limited bank powers. Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 686 (1983) ("only the powers specifically granted could be exercised by a chartered bank"). Banks chartered under that Act were to have the same powers as banks with special charters. *Id.*

An early case under the New York Act held that banks had no power to traffic in stocks. *Talmage v. Pell*, 7 N.Y. 328 (1852). Since the statute included no express authority to deal in stocks, the court considered whether such activity was incidental to "the express powers of the association." *Id.* at 344. The court held that it was not, because the power to traffic in stocks was neither "necessary [n]or expedient to accomplish the purpose for which banks are instituted." *Id.* at 345. The "business of banking," the court added, is not whatever "the directors [of the bank] might deem advantageous to the corporation." *Id.* at 343.

A similarly narrow view of bank powers prevailed in *Curtis v. Leavitt*, 15 N.Y. 9 (1857), a case heavily relied upon by petitioners and their amici. *See* Fed. Br. at 17-18; Conference of State Bank Supervisors Br. at 12; New York Clearing House Ass'n Br. at 16-18; American Bankers Ass'n Br. at 11. As in *Talmage v. Pell*, the New York judges asserted that corporations have "such powers as are specifically granted by the act of

deposits; by buying and selling the gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business. . . .

incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, *and as not having any other.*" *Curtis*, 15 N.Y. at 157 (Brown, J.) (emphasis added); *see also id.* at 54 (Comstock, J.) and 209 (Paige, J.).

Curtis held that banks had the power to borrow money, but the case did not hold that incidental bank powers should be "broadly interpreted." *Compare* Fed. Br. at 17. Two judges found that the power to borrow is necessary to perform enumerated bank powers. 15 N.Y. at 214-215 (Paige, J.); *Id.* at 158-60 (Brown, J.). Two other judges concluded that the power to borrow is so basic that it is incidental to *every* business. *Id.* at 56 (Comstock, J.); *id.* at 169 (Shankland, J.). Judge Comstock also held that the statute's enumerated powers "cover the whole ground of banking," that is, that the list of specific powers was a complete list of allowable bank activities. *Id.* at 56.[19]

Remarkably, petitioners never mention that portion of *Curtis* dealing with annuities, which specifically stated that the "business of banking" includes neither "insur[ing] property against loss by fire, nor insur[ing] lives, *nor grant[ing] annui-*

[19] Judge Comstock also noted that the power to borrow money was incidental to the express power to receive deposits. *Id.* at 53. A fifth judge concluded that banks had no such power, and dissented.

Even passages quoted by petitioners — when not taken out of context — support the view that incidental powers must be directly related to an express power. For example, the Comptroller cites Judge Comstock's statement that the statutory enumeration of powers was "not intended to 'restrict the appropriate business of banking.'" Fed. Br. at 18. But the quoted passage continues, in the same sentence, that the statutory specification of express powers was an "eminently useful" legislative definition of "th[e] business [of banking]" that "left nothing to construction or in doubt." *Curtis*, 15 N.Y. at 58. The Comptroller also selectively quotes the statement that "no human sagacity can foresee what implied powers may" prove necessary in the future. Fed. Br. at 18. But the next sentence emphasizes that unless the claimed power is "directly and immediately appropriated to the execution of the specific powers . . . it cannot be recognized as within the scope" of the bank's incidental powers. *Curtis*, 15 N.Y. at 157-58.

ties." 15 N.Y. at 212 (Paige, J.) (emphasis added). In support of this conclusion, *Curtis* cited an earlier New York case, *People v. Utica Ins. Co.*, 15 Johns. 358 (N.Y. Sup. Ct. 1818), which held that an insurance company could not engage in banking operations. Taken together, these cases demonstrate that when Congress enacted Section 24(7), the business of banking was understood to exclude the business of selling annuities and other insurance.[20]

2. The "Business of Banking" Is Not a Highly Elastic Term

Within the structure of Section 24(7), the "business of banking" is not so elastic as petitioners wish. Rather, Congress specified the principal elements of the business of banking through the express grants of power in Section 24(7). One thoughtful commentator, who is cited approvingly by the petitioners and their amici, reads *Talmage* and *Curtis* to construe the "business of banking" as "heavily dependent on the customs and usages of banking over many centuries, thereby limiting the business of banking to a coherent and principled group of activities." Symons, *supra*, at 697. Professor Symons concludes that the "business of banking" in Section 24(7) is limited

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20 Petitioners rely heavily upon a recent decision by the New York Court of Appeals upholding the state banking department's opinion that annuities are not insurance. *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353 (1994). That decision is frankly unfathomable in light of the holding in *Curtis v. Leavitt* and of the existence of a New York statute that specifically defines "annuities" as a "kind[] of insurance." N.Y. Ins. Law § 1113(a) (Consol. 1994). The court decision to allow the Banking Superintendent to overrule a validly-enacted state statute is perhaps best viewed as an example of judicial deference sliding into judicial abdication. *Cf. Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) ("[d]eference does not mean acquiescence"). In any event, the New York court observed that New York "has no statute that is analogous to 12 U.S.C. § 92," so that decision has no relevance to the Section 92 issue in this case. *New York State Ass'n of Life Underwriters*, 83 N.Y.2d at 365 (distinguishing the decision of the Fifth Circuit, below).

to the "historical activities of deposit taking, credit granting, and credit exchange." *Id.* at 692, 680-82. The sale of annuities as agent for insurance companies falls outside that description.

The Comptroller's expansive view of the National Bank Act is remarkable for its arrogation of lawmaking powers and for its reversal of the longstanding congressional policy that national banks have only limited powers. The Comptroller's approach to bank powers would result in the "expansion of the business of banking into every financial activity that a bank considers to be economically attractive." *Id.* at 726. Comptroller Williams sought to avoid that outcome when he advised Congress in 1916 that "it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores." 53 Cong. Rec. 11,001 (1916).

B. This Court Has Construed Section 24(7) As A Grant of Limited Powers

In construing bank powers under Section 24(7), this Court repeatedly has stated that powers not conferred by Congress are denied. *E.g.*, *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891). Incidental bank powers exist only as needed to effectuate an express power. As stated in *First Nat'l Bank v. Missouri*, 263 U.S. 640, 659 (1924) (national banks lack incidental authority to establish branches):

> Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

Texas & Pacific Ry. Co. v. Pottorff, 291 U.S. 245, 253 (1934) (Brandeis, J.), held that a national bank had no power to pledge its assets to secure private deposits. The Court explained (*id.*) (citations omitted):

> The measure of [a national bank's] powers is the statutory grant; and powers not conferred by Congress are denied. For the Act under which national banks are organized constitutes a complete system for their government[.]

Finding no historical evidence that the practice of pledging assets "ever prevailed among national banks," *Pottorff* rejected the claim that the power to pledge assets was incidental to the express power to "receiv[e] deposits." *Id.* at 254.

The Court reached a similar conclusion with respect to the power to pledge assets to secure the deposits of State funds, rejecting the expansive argument that banks have the "inherent power" to pledge assets to secure deposits of public funds. *Id.* at 264. *Marion v. Sneeden*, 291 U.S. 262, 264, 271-72 (1934) (Brandeis, J.); *accord Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940) (both historical practice and separate statute authorized Secretary of Treasury to exact security for federal monies deposited in national banks).

California Bank v. Kennedy, 167 U.S. 362 (1897), also supports a narrow construction of Section 24(7). *Kennedy* held, as did *Talmage v. Pell* for New York state banks, that national banks have no independent power to deal in stocks on their own account. The Court reasoned that "[t]he prohibition is implied from the failure to grant the power." *Id.* at 367. *See also Concord First Nat'l Bank v. Hawkins*, 174 U.S. 364 (1899) (national banks lack power to hold stock for investment).[21]

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[21] *Kennedy* distinguished an earlier case which allowed a national bank to acquire stocks for resale because that bank accepted the stock as a bona fide compromise of a doubtful debt. *First Nat'l Bank v. National Exch. Bank*, 92 U.S. 122, 128 (1876). The power to take appropriate steps to collect a debt was incidental to banks' express credit granting powers, and would not involve the bank "in the ordinary business of buying and selling for profit." *Id.* at 128.

The congressional policy of keeping banking separate from other economic activity is reflected in many rulings construing Section 24(7). This separation keeps bankers focused on banking and also preserves banks as a neutral source of credit by ensuring that banks do not compete with their borrowers. *First Nat'l Bank v. Converse*, 200 U.S. 425 (1906), held that a bank could not engage in a manufacturing enterprise, even though the bank had acquired stock in the company to recover on a debt of the company's corporate predecessor. The Court differentiated between taking stock as collateral for resale and taking stock for the purpose of operating a non-banking business. *Id.* at 439. Consistent with this principle, *Merchants' Nat'l Bank v. Wehrmann*, 202 U.S. 295 (1906), held that a bank could take a partnership interest in a land development business to recover on a bad debt, but only to obtain an accounting of the partnership property and receive a share of any remaining balance. *Id.* at 301-02.

Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972), reversed the Comptroller's determination that operating a travel agency, a car rental agency, and selling travel insurance are all incidental powers of national banks. The court of appeals held that those services fall outside the "normal traditional range" of banking, but allowed banks to perform such banking functions as selling travellers' checks and foreign currency, making travel loans, and issuing letters of credit. *Id.* at 430, n.6 and 438.[22] *See also Cockrill v. Abeles*, 86 F. 505 (8th Cir. 1898) (national bank could not operate mill acquired in satisfaction of debt); *Cooper v. Hill*, 94 F. 582 (8th Cir. 1899) (national bank could

[22] *Arnold Tours* also dismissed NationsBank's current argument that "necessary" as used in Section 24(7) must take its meaning from "necessary" as used in the "Necessary and Proper" clause of Article I of the Constitution. NationsBank Br. at 22. As *Arnold Tours* states, different principles of construction apply to constitutional and statutory provisions; constitutional implied powers "are to be generously construed." 472 F.2d at 431 (citing *M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819)).

repair mining property received in payment of debt, but could not operate mine); *Saxon, supra* (national banks may not sell insurance); *National Retailers Corp. v. Valley National Bank*, 604 F.2d 32 (9th Cir. 1979) (national bank cannot provide electronic data processing services); *cf. Independent Ins. Agents v. Department of Banking & Fin.*, 248 Ga. 787, 789 (1982) (under Georgia statute identical to Section 24(7), state bank could not operate insurance agency).

The policy of limiting banks to banking has been a constant in American history. In the wake of massive bank failures during the Great Depression, Congress enacted the Glass-Steagall Act to prohibit commercial banks from engaging in investment banking. Act of June 16, 1933, ch. 89, 48 Stat. 162. In proposing insurance powers for small-town national banks, Comptroller Williams stressed the trivial impact of his proposal. In his letter to Congress, he explained that "in many small places" insurance sales are "not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others." 53 Cong. Rec. 11,001 (1916). Comptroller Williams also noted that this modest new insurance power would not be "likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.*

Petitioners cite a handful of decisions finding particular activities to be incidental to banking. *See, e.g., Merchants' Nat'l Bank v. State Nat'l Bank*, 10 Wall. (77 U.S.) 604 (1870); *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913); *First Nat'l Bank v. Hartford*, 273 U.S. 548 (1927); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). None of these cases challenges the principle that an incidental bank power must be directly related to an express bank power, such as deposit taking, credit granting (*i.e.*, "loaning money") or credit exchanging (*i.e.*, "discounting and negotiating"). *See generally*, Symons, *supra*, at 701-14.

Merchants Nat'l Bank, for example, held that the power to certify checks is incidental to the express power to receive deposits. 10 Wall. (77 U.S.) at 649. *Clement Nat'l Bank* found that the power to pay state taxes on depositors' accounts is incidental to the express power to receive deposits coupled with the state's power to collect taxes by garnishment. 231 U.S. at 140. *First Nat'l Bank of Hartford* stated that the power to sell mortgages and evidences of debt is incidental to the express powers to "discount[] and negotiat[e] promissory notes, drafts, bills of exchange, and other evidences of debt," and to loan money on real estate mortgages. 273 U.S. at 559-60 (citing Section 24(7) and law now codified at 12 U.S.C. § 371(a)). *Colorado Nat'l Bank* reasoned that the power to conduct a safe-deposit business is implied by banks' express powers to accept "special deposits" and to invest in safe-deposit corporations. 310 U.S. at 48-50 (citing 12 U.S.C. § 133 and proviso added to 12 U.S.C. § 24(7) in 1927). Finally, *Franklin Nat'l Bank* held that the express power to receive deposits implies the power to "let the public know about it" by advertising. 347 U.S. at 377-78.

Most of the lower court decisions cited by petitioners also tie incidental powers to banks' enumerated powers.[23] *See, e.g.*,

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[23] Even the Comptroller usually justifies new incidental powers with relation to banks' enumerated powers. *See, e.g.*, OCC Interpretive Letter No. 283, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447 at 77,609 (Mar. 16, 1984) (sale of credit-related life and disability insurance and involuntary unemployment insurance "is directly related to the bank's express lending authority"); OCC Interpretive Letter No. 326, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,496 at 77,756 (Jan. 17, 1985)(power to broker options incidental to express power to broker securities); OCC Interpretive Letter No. 356, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,526 (Jan. 7, 1986)(power to execute orders for agricultural and metals futures contracts for customers is incidental to "banks' express lending power" provided that activity "is limited to hedging transactions in connection with loans to Bank customers"); OCC Interpretive Letter No. 388, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. ¶ 85,612 at 77,940 (June 16, 1987) (issuance of mortgage-

M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1382-83 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (secured auto loan in form of lease arrangement is incidental to express power to "loan[] money on personal security," but bank could not provide repair services or insurance coverage); *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (sale of mortgage pass-through certificates is incidental to express power to sell mortgage loans). Even *Independent Bankers' Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), which misapplied Section 92 in approving the sale of credit life insurance, attempted to justify that activity under Section 24(7) as directly related to banks' express power to loan money on personal security. *Id.* at 1170. In contrast, the Comptroller makes no claim that the sale of annuities is directly related to any enumerated bank power.

C. The Sale Of Annuities Is Not Part Of The "Business Of Banking"

The Comptroller contends that the sale of annuities is a part of the "business of banking," which assertedly includes the "power to broker financial investment instruments." NationsBank Pet. App. 38a. This supposed power appears nowhere in Section 24(7), and the Comptroller cites no authority to suggest that such a bank power predated enactment of that statute in 1863. Indeed, the evidence is all to the contrary.

When New York enacted the Free Banking Act of 1838 and when Congress later enacted Section 24(7), they each intended to define the "business of banking" as it was then understood, and to leave "nothing to construction or in doubt." *See Curtis*, *supra*, 15 N.Y. at 58 (Comstock, J.); *Pottorff*, *supra*, 291 U.S. at 253 (statute is full measure of bank powers and

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backed pass-through certificates "represents nothing more than the negotiation of evidences of debt and the sale of real estate loans, which is expressly authorized under 12 U.S.C. §§ 24(Seventh) and 371(a)").

constitutes "complete system"). Nothing in either statute suggests the existence of a power to broker financial investment instruments. Banks could scarcely broker annuities under an amorphous "financial investment instruments" power when it was clearly understood in 1863 that banks could not sell annuities. *Curtis*, 15 N.Y. at 212 (Paige, J.).

The Comptroller insists that the power to broker financial investment instruments derives from banking tradition, NationsBank Pet. App. 38a, but the historical support is very thin, and cannot be stretched to cover annuities. By the beginning of this century, national banks were pressuring the Comptroller for the power to trade in securities, which many state banks could do but national banks did not. *See* Ridgely, *Government Control of Banks and Trust Companies*, 23 Annals 17, 24 (1904) (Comptroller of the Currency).

The Comptroller responded to these complaints in 1902 by quietly authorizing national banks to purchase and sell debt securities. A few national banks established security affiliates, but this practice was denounced as beyond the powers of national banks by the congressional Pujo Committee in 1913, Pujo Report, Money Trust Investigation, 62d Cong., 3d Sess., H. Rep. 1593 (1913) at 151, and by Sen. Carter Glass in 1925. Hearings on the Consolidation of National Banking Associations, Senate Banking and Currency Comm., S. 3316, 68th Cong., 2d Sess. (1925) at 111 ("There is nothing in the national banking act that permits it"); *see generally*, Edwin J. Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 488-95 (1971).

The sale of securities by national banks finally was approved in the McFadden Act of 1927, which authorized national banks to engage in the "business of buying and selling investment securities." 44 Stat. 1226. Following the Crash of 1929, the Glass-Steagall Act of 1933 limited that power to "purchasing and selling . . . securities and stock without recourse, solely upon

the order, and for the account of, customers, and in no case for [the bank's] own account." 12 U.S.C. § 24(7).

These events, decades after enactment of the National Bank Act, do not establish that the "business of banking" in Section 24(7) includes the sale of annuities. First, even the powers granted 60 years later in the McFadden Act did not reach annuities. In addition to being an insurance product, and therefore not a true stock or security, annuities are fundamentally different from the "investment securities" covered by that law. Banks principally have been allowed to broker investment securities to assist customers in transferring assets in forms that are highly liquid. In contrast, both variable and fixed annuities are purchased by individuals for themselves, and the premiums and payouts are uniquely tailored to the mortality expectations for each individual and his or her financial situation. An annuity, once issued, is not negotiable in any marketplace, since most annuities are measured by the remaining life of the annuitant. *See* Symons, *supra*, at 718 (annuities are not part of "business of banking" because they are "long-term, nonmarketable investments, locking up assets rather than providing a pool of liquidity").

Thus, the Comptroller cannot justify the sale of annuities by national banks on the basis of his customary rationale for bank brokerage powers: that "'Banks are regular, active participants in the financial trading markets and normally will have *trading expertise*.'" Fed. Br. at 21 (quoting OCC Interpretive Letter No. 494, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,199 (Dec. 20, 1989)) (emphasis added). Banks have no trading expertise with respect to annuities, both because annuities are not traded in any market and because banks have no expertise at all about annuities, which are an insurance product. Thus, although national banks have been authorized to broker a variety of negotiable securities, options and futures, *see* Fed. Br. at 22 n.8 (listing OCC rulings),

those activities provide no basis for permitting national banks to sell insurance products that are not marketable investment securities.

Moreover, NationsBank proposes to sell annuities that will have a fixed annuity option, and others with combination fixed and variable features. Because both *SEC v. VALIC* and *United Benefit* established that fixed annuities are not securities, *see* p. 32, *supra*, any product including a fixed annuity feature cannot be deemed a security within the bank's brokerage authority.[24]

D. Section 92's Specific Prohibition Would Prevail Over Any General Power In Section 24(7)

Even if the sale of annuities could be called part of the "business of banking" under Section 24(7), any general authority conferred by that statute could not overcome the specific insurance agency prohibition in Section 92. As the court of appeals reasoned, a "power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary' power." NationsBank Pet. App. 16a (quoting *Saxon*, 399 F.2d at 1014). *First Nat'l Bank v. Missouri* applied the same principle (263 U.S. at 659):

> [I]t is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power.

By granting limited insurance agency authority in Section 92, Congress "negate[d] the existence of any other power to act as

[24] NationsBank argues that the Glass-Steagall Act expressly authorizes it to sell its annuities. NationsBank Br. at 30-37. As the Comptroller recognized in his Petition, however, "this case does not present that issue." Fed. Pet. at 6-7 n.3. To the contrary, the Comptroller's Approval specifically eschewed any reliance upon the Glass-Steagall Act (NationsBank Pet. App. 37a-38a), and that statute was not mentioned by the district court or the court of appeals in their respective opinions. Indeed, NationsBank's Glass-Steagall Act theory is not even fairly included in its own "Questions Presented." *See* Sup. Ct. R. 14.1(a). The prohibition of Section 92 would override any authority under NationsBank's Glass-Steagall Act theory, in any event.

an insurance agent under the general provisions of Section 24(7)." *Saxon*, 399 F.2d at 1014. That specific prohibition prevails over any general banking authority conferred by Section 24(7). *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one"); *Busic v. United States*, 446 U.S. 398, 406 (1980) ("a more specific statute will be given precedence over a more general one, regardless of their temporal sequence").

CONCLUSION

The power to establish national banks, and to decide what powers those banks will have, belongs to Congress, which has not given them the power to sell annuities. With due regard to *Chevron*, Comptroller Williams explained long ago that "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." 53 Cong. Rec. 11,001 (1916). As the court of appeals aptly concluded its opinion below, (NationsBank Pet. App. 17a):

> [If] banks seek[] more power than they are currently granted under §§ 92 and 24(7) . . . [they] should look to Congress, not the Comptroller . . . or the courts.

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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CURRENT STATE STATUTES DEFINING INSURANCE AND ANNUITIES

State	(1) Annuity= Insurance	(2) Annuity= A Kind Of Insurance	(3) Annuity=Life Insurance	(4) Insurance= Contingent Payment
Alabama		X		X
Alaska		X		X
Arizona		X		X
Arkansas	X			
California			X	
Colorado	X			X
Connecticut				X
Delaware	X	X		X
Florida			X	X
Georgia				X
Hawaii			X	X
Idaho				X
Illinois			X	
Indiana			X	
Iowa	X			
Kansas	X	X		
Kentucky	X	X		X
Louisiana			X	X
Maine	X	X		X
Maryland		X		X
Michigan			X	
Minnesota		X		
Montana				X
Nebraska		X		
Nevada		X		
New Hampshire		X		
New Jersey	X	X		
New Mexico			X	X
New York		X		
North Carolina			X	
North Dakota	X			
Ohio	X			
Oklahoma			X	X

State	(1) Annuity= Insurance	(2) Annuity= A Kind Of Insurance	(3) Annuity=Life Insurance	(4) Insurance= Contingent Payment
Oregon	X	X		X
Pennsylvania	X			
Rhode Island		X		
South Carolina	X			X
South Dakota		X		X
Tennessee			X	
Utah	X			
Vermont	X	X		
Virginia		X		
Washington			X	X
West Virginia			X	X
Wisconsin			X	
Wyoming		X		X
TOTALS:	**15**	**20**	**14**	**23**

NOTES

(1) State statutes in this category specifically define "insurance," "insurance contract" or insurance "policy" to include annuities. A number of states do not define "insurance" per se.

(2) State statutes in this category specifically list annuities as a "class," "kind," "type" or "line" of insurance. Many states' statutes do not specifically enumerate the various kinds of insurance.

(3) State statutes in this category specifically define life insurance to include annuities. In order to minimize double counting, no entry is made under this category if a state falls in category (1) or (2).

(4) State statutes in this category define insurance to include the "pay[ment of] a specified amount or benefit upon determinable contingencies" or words of similar import.

SOURCES

Ala. Code §§ 27-1-2, 27-5-3 (1994)

Alaska Stat. §§ 21.12.055, 21.90.900 (22) (1993)

Ariz. Rev. Stat. Ann. §§ 20-103, 20-254.01 (1993)

Ark. Code Ann. § 23-60-102 (1) (1993)

Cal. Ins. Code § 101 (West 1994)

Colo. Rev. Stat. 10-1-102 (7) (1994)

Conn. Gen. Stat. § 38a-1 (10) (1993)

Del. Code Ann. tit. 18, §§ 102, 1715, 2302 (1993)

Fla. Stat. Ann. §§ 624.02, 624.602 (West 1993)

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Haw. Rev. Stat. §§ 431:1-201, 431:1-204 (1994)

Idaho Code § 41-102 (1994)

Ill. Ann. Stat. ch. 215, para. 5, § 4 (Smith-Hurd 1993)

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Iowa Code Ann. § 507B.2 (West 1994)

Kan. Stat. Ann. §§ 40-247, 40-601 (1993)

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La. Rev. Stat. Ann. §§ 22:5 (1), 22:6 (1) (West 1994)

Me. Rev. Stat. Ann. tit. 24-A, §§ 3, 703 (West 1993)

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Mich. Comp. Laws Ann. § 500.602 (West 1994)

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Mont. Code Ann. § 33-1-201 (5) (1993)

Neb. Rev. Stat. § 44-201 (1993)

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N.C. Gen. Stat. § 58-58-1 (1991)

N.D. Cent. Code § 26.1-26-02 (1) (1993)

Ohio Rev. Code Ann. § 3902.02 (A) (Baldwin 1993)

Okla. Stat. Ann. tit. 36, §§ 102, 702 (West 1994)

Or. Rev. Stat. §§ 731.102, 731.154 (1993)

Pa. Stat. tit. 40, § 1171.3 (1994)

R.I. Gen. Laws § 27-3.2-2 (1993)

S.C. Code Ann. § 38-1-20 (19) (Law. Co-op. 1976)

S.D. Codified Laws Ann. §§ 58-1-2 (10), 58-6-20 (1994)

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Utah Code Ann. § 31a-1-301 (1994)

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Va. Code Ann. §§ 38.2-106, 38.2-107 (Michie 1994)

Wash. Rev. Code Ann. §§ 48.01.040, 48.11.020 (West 1994)

W. Va Code §§ 33-1-1, 33-1-10 (1994)

Wis. Stat. § 71.42 (3) (1993)

Wyo. Stat. §§ 26-1-102 (a) (xv), 26-5-119 (1994)

EARLY STATE STATUTES DEFINING THE BUSINESS OF INSURANCE TO INCLUDE THE GRANTING, SELLING AND DISPOSING OF ANNUITIES

State	Statute
Arizona	Ariz. Rev. Stat. § 3423 (1913)
Arkansas	1913 Ark. Acts 220
California	1915 Cal. Stat. 1534 ch. 768, § 1
Colorado	1913 Colo. Sess. Laws ch. 99, § 29
Connecticut	1883 Conn. Pub. Acts ch. 90, § 1
Florida	1851 Fla. Laws ch. 313, § 1
Idaho	1901 Idaho Sess. Laws 169 ch. 2, § 6
Illinois	1911 Ill. Laws 377, § 1
Indiana	1899 Ind. Acts ch. 28, § 1
Iowa	1900 Iowa Acts ch. 65, § 2
Kansas	1907 Kan. Sess. Laws ch. 227, § 1
Kentucky	1893 Ky. Acts ch. 171, § 106
Louisiana	1908 La. Acts. 203, § 1
Maine	1899 Me. Acts ch. 55
Maryland	1868 Md. Laws ch. 471, § 99
Massachusetts	1907 Mass. Acts. ch. 576, § 66
Michigan	1869 Mich. Pub. Acts 77, § 1
Minnesota	1895 Minn. Laws ch. 175, § 27
Mississippi	1904 Miss. Laws ch. 79, § 3
Missouri	1869 Mo. Laws 27, § 1
Nebraska	1913 Neb. Laws ch. 154, § 78
Nevada	1891 Nev. Stat. ch. 98, § 9
New Jersey	1914 N.J. Laws ch. 88
New Mexico	1909 N.M. Laws ch. 48, § 25
New York	1853 N.Y. Laws ch. 463, § 1

North Carolina	1899 N.C. Sess. Laws ch. 54, § 55
North Dakota	1891 N.D. Laws ch. 73, § 1
Ohio	1872 Ohio Laws 150
Oklahoma	1909 Okla. Sess. Laws ch. 21, § 3
Pennsylvania	1911 Pa. Laws 581 § 1
South Carolina	1910 S.C. Acts 420, § 10
Tennessee	1875 Tenn. Pub. Acts ch. 142, § 10
Texas	1909 Tex. Gen. Laws ch. 108, § 1
Vermont	1915 Vt. Pub. Acts 158, § 1
Washington	1913 Wash. Sess. Laws ch. 109, § 2
West Virginia	1907 W. Va. Acts ch. 77, § 17
Wisconsin	1850 Wis. Laws ch. 232, § 1
Wyoming	1911 Wyo. Sess. Laws ch. 50

(20) (20)

Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANK SECURITIES, INC.

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REPLY BRIEF OF PETITIONERS NATIONSBANK OF NORTH CAROLINA, N.A. AND NATIONSBANC SECURITIES, INC.

NationsBank of North Carolina, N.A. and its wholly-owned brokerage subsidiary, NationsBanc Securities, Inc. (collectively, "NationsBank"), submit this reply brief in response to the brief of Respondent, Variable Annuity Life Insurance Co. ("VALIC") and its supporting *amici*.[1] In its opening brief NationsBank demonstrates that the Comp-

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[1] NationsBank Corporation is the parent company of NationsBank of North Carolina, N.A. NationsBank Community Development Corporation and NationsBank Housing Fund Investment Corporation are partially owned subsidiaries of NationsBank of North Carolina, N.A.

troller of the Currency ("Comptroller") engaged in reasoned decisionmaking in approving NationsBank's request to sell, as agent, all forms of fixed and variable annuities to its customers ("Comptroller's Approval") and that the Comptroller's interpretations of the National Bank Act were permissible and consistent with the purposes and structure of that Act. These arguments are not repeated in this Reply Brief. Instead, NationsBank limits its responses here to the selective legal contentions raised by VALIC in its brief.

I. THE POWER TO SELL FIXED AND VARIABLE ANNUITIES IS DERIVED FROM A NATIONAL BANK'S AUTHORITY TO EXERCISE "ALL SUCH INCIDENTAL POWERS AS SHALL BE NECESSARY TO CARRY ON THE BUSINESS OF BANKING" AS WELL AS TO ENGAGE IN THE BUSINESS OF SELLING SECURITIES AS AGENT.

Respondents' brief continues to advance the fatally flawed argument they have maintained in the courts below: that national banks and their operating subsidiaries do not have the power to sell as agent fixed and variable annuities. As demonstrated in our opening brief, the authority of national banks to sell fixed and variable annuities is derived from two sources. First, with respect to the sale of both fixed and variable annuities, the Comptroller's Approval states that such authority is based upon the provisions of the National Bank Act granting national banks "all such incidental powers as shall be necessary to carry on the business of banking . . . ." 12 U.S.C. § 24 Seventh (first sentence) ("Section 24 Seventh"). Second, at least with respect to the sale of variable annuities, the Comptroller's staff has acknowledged since 1985 the power to engage in such activity based on the Glass-Steagall Act, which is codified as the second sentence of 12 U.S.C. § 24 Seventh.[2] The Glass-Steagall Act empowers national banks

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[2] Act of June 16, 1933, ch. 89, 48 Stat. 184.

to engage in the "business of dealing in securities and stock . . . without recourse, solely upon the order, and account of, customers . . . ." The existence of this latter authority was expressly confirmed by the Comptroller in the Comptroller's Approval. NationsBank Pet. App. 37a; NationsBank Br. App. 3a.

With respect to the authority provided by Section 24 Seventh, VALIC contends that the "business of banking" has had a fixed and immutable meaning since the time of the Civil War, when the "business of banking" was not understood to include the sale of annuities. VALIC Br. 36-39. VALIC's basic argument slights numerous relevant decisions of this Court and of the lower courts. These decisions, reflecting the intent of Congress, have construed the "business of banking" dynamically and functionally. *See* NationsBank Br. 26-30. VALIC urges this Court to adopt an unduly narrow construction of the "business of banking," which would effectively deny the Comptroller any meaningful ability to interpret banking powers in a rapidly changing financial services world. Without this necessary regulatory flexibility, national banks will be unable to compete effectively with state-chartered banks and other financial services providers in direct contravention of the will of Congress.

As to the Glass-Steagall authority, VALIC in a footnote incorrectly contends that this case does not present any Glass-Steagall issue. VALIC Br. 48 n.24. That is plainly incorrect. VALIC's complaint in this case broadly seeks injunctive relief "prohibiting [NationsBank] from entering the insurance business by engaging in the sale of fixed and variable annuities." VALIC Compl. ¶ 3, R. 0150.[3] The questions presented by both petitions for certiorari fairly included this issue, and NationsBank's Petition expressly

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[3] References to "R. ____ " herein are page references to the record on appeal to the court of appeals.

states that the Glass-Steagall Act "is directly at issue in this case." NationsBank Pet. 4 n.3.

A. Congress Intended That the Banking Activities and Services Encompassed by the Incidental Powers Clause Evolve as the Business of Banking Changes to Meet the Needs of the Financial Services Marketplace.

This Court has never subscribed to VALIC's position that Congress intended the "business of banking" to have essentially a fixed and static meaning based upon what was understood to be the "business of banking" in the period prior to 1863. Moreover, simply because Section 24 Seventh, as it was enacted in 1863 and as revised in 1864,[4] was modeled upon Section 18 of the New York Free Banking Act of 1838,[5] it does not follow that particular interpretations given the New York law by the New York courts prior to 1863 somehow were intended by Congress to be subsumed forever into the fabric of the National Bank Act.[6]

For one thing, Congress' objectives in enacting the National Bank Acts of 1863 and 1864 were quite different from those of the New York legislature in 1838. The National Bank Acts were enacted at a time when the national

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[4] The statute enacted in 1863 was originally titled the National Currency Act of 1863, Act of February 25, 1863, ch. 58, 12 Stat. 665. This statute was repealed and replaced by the Act of June 3, 1864, ch. 106, 13 Stat. 96. Both statutes have come to be referred to as a "National Bank Act," and will be referred to as such herein. *See* 12 U.S.C. § 38.

[5] 1838 N.Y. Laws 245, 249, ch. 260, § 18. The provision is reprinted at VALIC Br. 36-37 n.18.

[6] Even if the pre-Civil War interpretations given by the New York courts were to be adopted, those interpretations could be read to support the dynamic interpretation of Section 24 Seventh being urged here. *See* discussion of *Curtis v. Leavitt*, 15 N.Y. 9 (1857) in the Brief of the New York Clearinghouse Association as *Amicus Curiae* in Support of Petitioners at 17-18.

government was under severe financial pressures from the war effort, and a national banking system with a uniform national currency was judged to be a financial necessity.[7] In order to encourage the chartering of national banks, Congress believed that it was important that national bank charters be sufficiently attractive to attract potential investors in national banks and to tempt existing state-chartered banks to convert to national charters. As a result, the National Bank Act reflected the overriding national policy of promoting "competitive equality" in banking powers between national banks and state banks as a necessary ingredient for the preservation and promotion of a national banking system. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 564-65 (1934); Emmette S. Redford, *Dual Banking: A Case Study in Federalism*, 31 Law & Contemp. Problems 749, 763 (1966).

The historical origin of Section 24 Seventh is not the only basis for concluding that it was intended to be interpreted in a dynamic manner. The literal language of the statute itself also reflects such dynamism. By using the term "business of banking," Congress tied the interpretation of incidental powers to a term that is purposefully broad and that it understood would inevitably evolve over time to encompass new activities and services as changes occurred in finance and commerce. The term was intended to enable national banks to remain viably competitive.

From the beginning, this Court's decisions have recognized the dynamism of the incidental powers clause and have upheld the provision of new banking services and

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[7] *See* Special Message of President Abraham Lincoln to the Congress on Financing the War, Senate Journal, 37th Cong., 3d Sess., 121-22 (Jan. 17, 1863), *reprinted in*, Senate Comm. on Banking and Currency, 88th Cong., 1st Sess., *Federal Banking Laws and Reports, 1780-1912*, at 306-07 (1963).

activities that have "grown out of the business needs of the country." *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 648 (1872) (certification of checks upheld as an incidental power); *see also First Nat'l Bank v. National Exchange Bank*, 92 U.S. 122, 127 (1875) ("The [incidental] powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently.")

At the time Congress adopted the National Bank Act of 1863, it also established the Comptroller of the Currency to administer the national banking and currency system that had been created. 12 U.S.C. § 1 *et seq.* The Comptroller's duties included "enforcement of the banking laws," *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627 (1971), and the comprehensive supervision of the activities of national banks. Accordingly, at the same time as it granted national banks the incidental powers necessary to engage in the business of banking, Congress also created an expert regulator to whom banks and the public appropriately could look to determine what activities and services are, at any given time, reasonably part of, or incidental to, the "business of banking."[8] *See* NationsBank Br. 17-18. This regulatory authority vested in the Comptroller was not without boundaries; rather, this authority had to be exercised in a reasonable manner consistent with the purposes of the National Bank Act. This is precisely what the Comptroller did in this case. The Comptroller carefully articulated a reasoned basis for concluding that the brokerage of annuities was part of the "business of banking." This con-

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[8] Although originally an opponent of the National Bank Act of 1863, Hugh McCulloch was persuaded by Secretary of the Treasury Salmon P. Chase to become the first Comptroller of the Currency in 1863. Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 731 (1957).

clusion was based on the traditional role of national banks as financial intermediaries and upon the close functional similarity between annuities and other financial investment instruments that national banks are authorized to sell. Pet. App. 37a-41a. It is noteworthy that VALIC has not challenged the Comptroller's underlying reasons for concluding that annuities brokerage was part of the business of banking, but rather has relied entirely on the argument that the business of banking was frozen in the Civil War era, as if it were some Brady daguerreotype.

Finally, the very New York courts that VALIC embraced as the authoritative sources of what the National Bank Act means themselves have rejected VALIC's static construction of the "business of banking" under the New York Banking Law. After quoting precisely the same case relied upon so heavily by VALIC, *Curtis v. Leavitt*, 15 N.Y. 9 (1857), the New York Court of Appeals earlier this year stated:

> We have long been mindful that the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service. Our courts must be cognizant of these adjustments in ruling on cases involving interpretation of the Banking Law.

New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't, 82 N.Y.2d 353, 361, 632 N.E.2d 876, 880 (1994) (considering the authority of state-chartered banks to broker fixed and variable annuities).[9] The New York Court of Appeals expressly rejected the insurance industry's contention that the incidental powers clause

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[9] Contrary to VALIC's contention, the most recent opinion of the New York Court of Appeals is consistent with the holding of *Curtis v. Leavitt*, 15 N.Y. at 54-59 (state banks can borrow money even though not expressly empowered to do so), and the various supporting opinions, *see id.* at 58 (Comstock, J.) and at 157 (Brown, J.).

was limited to those activities which are necessary to achieve the powers expressly outlined in the New York Banking Law. "Rather, the clause must be construed as an independent, express grant of power, intended to reflect the ever-changing demands of the banking business." 82 N.Y. 2d at 363, 632 N.E. 2d at 881.[10]

B. The Glass-Steagall Act Authorizes National Banks to Sell at Least Some Types of Annuities.

VALIC only tangentially addresses the merits of the contention that the Glass-Steagall Act authorizes national banks to sell at least variable annuities by authorizing national banks to engage in "[t]he business of dealing in securities and stock . . . for the account of, customers . . . ." 12 U.S.C. § 24 Seventh (second sentence). Instead, VALIC contends (VALIC Br. 48 n.24) that this case does not present the issue because the Comptroller's Approval did not find it necessary to rely upon the Glass-Steagall Act in order to "find that brokerage of *fixed* annuities is a permissable activity for national banks . . . ." Pet. App. 37a (emphasis supplied).

The defect in VALIC's argument is that its own complaint sought an injunction prohibiting the NationsBank petitioners from "engaging in the sale of fixed and variable

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[10] Other states also have construed the incidental powers provisions of their state banking laws in a dynamic manner. *See Corbett v. Devon Bank*, 12 Ill. App. 3d 559, 299 N.E.2d 521 (1973) (upheld power of Illinois banks to engage in renewals of motor vehicle licenses and to receive the statutory fees therefor); *City of Pittsburgh v. Allegheny Valley Bank*, 488 Pa. 544, 555, 412 A.2d 1366, 1372 (Pa. 1980) (concurrence of Flaherty, J.) ("[T]he official comment [on the incidental powers clause] states: 'The provision covers a *wide range and variety of activities* in which institutions engage as part of the conduct of their banking business and is intended to cover other activities in which institutions may engage in the future.'" (Emphasis in original.))

annuities." VALIC Compl. ¶ 3, R. 0150. NationsBank raised as an issue before the district court, and argued extensively as an alternative defense, that even if the Comptroller's Approval were not upheld, the right to sell at least variable annuities must be upheld under the Glass-Steagall Act.[11] NCNB Defendants' Memorandum in Support of Their Motion for Summary Judgment, filed August 20, 1991 at 19-28, R. 0433-42. VALIC also raised the Glass-Steagall issue in its papers. Plaintiff's Memorandum in Support of Its Motion for Summary Judgment, filed May 10, 1991 at 5-6, R. 0104-05. Given the disposition of the District Court, it was not required to reach the issue. On appeal, VALIC did not raise Glass-Steagall authority in its opening brief, although NationsBank did urge in its brief that the district court's judgment should be affirmed on the ground that the Glass-Steagall Act "provides a separate and independent basis of authority for annuity sales." Brief of NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc., filed May 18, 1992, at 28-29. The Court of Appeals ignored the issue.

VALIC's strained effort to maintain that Glass-Steagall Act authority is not fairly presented by this case is belied by the scope of the questions presented by both petitioners in these consolidated cases, Fed. Pet. at i, NationsBank Pet. at i (the Glass-Steagall Act is part of 12 U.S.C. § 24(7), which is referenced in both questions presented), and by the statement appearing in our Petition, *id.* at 4 n.3 ("[T]he issue of whether annuities are securities which may be brokered by national banks under the express powers

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[11] NationsBank relied, in part, on the reasoning reflected in a line of Comptroller staff interpretive letters. OCC Ltr. No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) 84,501, at 77,773 (Apr. 4, 1985); OCC Ltr. No. 415, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,639, at 78,000 (Feb. 12, 1988); OCC Ltr. No. 429, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,653, at 78,032 (May 19, 1988).

granted national banks under the [Glass-Steagall Act] is directly at issue in this case.")

VALIC's only attempt at a substantive response to the Glass-Steagall Act basis for national bank authority to sell annuities is its contention that all the annuities which NationsBank proposed to sell should properly be deemed fixed annuities. VALIC bases this on its assertion that all annuities offered by NationsBank contain a fixed option and that, therefore, somehow none of the annuities being offered would be Glass-Steagall securities.[12] VALIC Br. 32, 48. Factually, VALIC is without support in the record.[13] NationsBank's notice to the Comptroller sought approval to offer the annuities of various issuers having various fixed and variable accumulation options, including annuities under which the contract owners would "be permitted to direct that premium/investment payments accumulate solely in a variable account." Admin. R. at 7 (certified on July 30, 1991), R. 0013. NationsBank's notice was broadly worded so as to permit the sale of a wide range of annuity products.

Moreover, even if the contracts offered customers a combination of fixed and variable features or options, that fact would not *ipso facto* require that they be characterized as fixed annuities and, in turn somehow deemed not to

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[12] Even fixed annuities may be Glass-Steagall securities. In a case involving VALIC, the Seventh Circuit has held that certain fixed annuities were securities required to be registered under the Securities Act of 1933, 15 U.S.C. § 77a *et seq. Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127 (7th Cir. 1986) (opinion on rehearing), *cert. denied*, 486 U.S. 1026 (1988).

[13] VALIC is similarly without support in the record for its statement that "NationsBank has not proposed to sell term certain annuities." VALIC Br. 31 n.16. Because NationsBank's application to the Comptroller sought authority to sell every form of commercially available annuity contract, term certain annuities and other types of annuities which did not use a mortality calculation were approved for sale and, in fact, have been sold by NationsBank.

constitute securities within the meaning of the Glass-Steagall Act. The folly of this reasoning is demonstrated by the annuity contract at issue in *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), oddly relied upon by VALIC in support of its contention. VALIC Br. 32, 48. The terms of the annuity contract in that case provided that during the accumulation period premiums would accumulate in a "Flexible Fund," the major part of which was invested in common stocks. However, the contract purchaser would be guaranteed a certain specified minimum return upon maturity regardless of the performance of the "Flexible Fund." 387 U.S. at 205-08. The annuity contract, therefore, possessed precisely the fixed return feature in the accumulation period that VALIC contends should result in the characterization of the entire contract as a fixed annuity. Yet, this Court had "little difficulty in concluding" that the accumulation portion of this contract "does not fall within the insurance exemption of § 3(a) of the Securities Act" and that it does constitute an "investment contract" under Section 2 of the Securities Act. 387 U.S. 210-11. This Court, using arguments similar to those used by the Comptroller below, judged the annuity contract in part on the basis of how it was marketed: "Contracts such as the 'Flexible Fund' offer important competition to mutual funds and are pitched to the same consumer interest in growth through professionally managed investment." 387 U.S. at 211 (citation omitted).

The *United Benefit Life* decision, rather than aiding VALIC, provides powerful support for the contention that an annuity contract should be deemed a Glass-Steagall security at least so long as it offers any variable feature or option to the customer. While not dispositive of its classification under the Glass-Steagall Act, the Comptroller has consistently taken the position that classification of an instrument as a security under the Securities Act is "highly relevant" as to its classification under the Glass-Steagall Act. *See* NationsBank Br. 33-34 (authorities collected).

VALIC's contention that the presence of any fixed feature or option renders the entire contract "insurance" was clearly rejected in *United Benefit Life*. 387 U.S. at 207. This holding was reaffirmed last term in *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 527-28 & n.13 (1993).

While the Glass-Steagall Act provides an alternative basis for reversal of the judgment below, this Court, of course, need not reach the issue if the Comptroller's Approval is upheld. If, however, this Court were to overturn in whole or in part the Comptroller's Approval, and the Court determines not to reach the Glass-Steagall Act issue, at minimum NationsBank would be entitled to a remand on this issue.

II. SECTION 92 IS NOT A LIMIT ON THE POWER OF NATIONAL BANKS TO SELL ANNUITIES WHEREVER LOCATED.

In order to prevail on its contention that 12 U.S.C. § 92 ("Section 92") bars national banks from selling annuities, VALIC must establish both of the two fundamental propositions in its brief. First, VALIC must demonstrate that the legislative origins of Section 92 and application of the maxim of *expressio unius* demonstrate that Congress did not intend national banks to be able to sell any insurance products. VALIC Br. 11-16. Second, VALIC must prove that the Comptroller could not have rationally concluded that annuities were not insurance. VALIC Br. 16-35.

Contrary to VALIC's contentions, neither the legislative history of Section 92 nor, more importantly, its actual language states that national banks may not sell any insurance products. In contending that the Comptroller could not have rationally determined that annuities were not insurance, VALIC incorrectly states that there is unanimity in the academic community on the issue and slights the numerous authorities referenced by the Comptroller. In addition, VALIC makes no attempt to refute the un-

derlying functional analysis used by the Comptroller in concluding that annuities are purchased primarily as financial investments by "[i]nvestors . . . seeking a guaranteed, long-term return on their assets." Pet. App. 38a. Even if VALIC had presented a plausible basis for disagreeing with the Comptroller's decision as to the "insurance" status of annuities, it has clearly failed to demonstrate that the Comptroller's determination was "unreasonable" or otherwise impermissible, as VALIC must in order to prevail. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992).

A. The Text and Legislative History of Section 92 Do Not Establish That Congress Intended to Prohibit National Banks From Selling Annuities As Agent.

While VALIC references a number of cases in which the maxim of *expressio unius est exclusio alterius* was used by this Court as a tool of statutory construction, all of those cases differ from the present one in at least one critical respect. Unlike the statutes being construed in those cases, Section 92 by its very terms provides that the power being granted thereby is "*in addition to* the powers now vested by law in national banking associations . . ." (emphasis added). The application of the *expressio unius* maxim in this case is vitiated by the express language of Section 92. VALIC's proposed application of *expressio unius* would, in effect, read the "in addition to" language out of Section 92.

In any event, even if it were apposite, this Court has "treated the maxim '*expressio unius est exclusio alterius*' as but an aid to construction," *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 n.8 (1943), and has treated the maxim as "subordinate" to other relevant indicia of legislative intent. 320 U.S. at 350-51. A number of courts have stated that the "maxim is to be applied with great

caution and is recognized as unreliable." *Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Bethelehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982); *see also National Petroleum Refiners Ass'n v. Federal Trade Comm'n*, 482 F.2d 672, 676 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *Bruce v. Lumbermens Mut. Casualty Co.*, 222 F.2d 642, 645 (4th Cir. 1955). VALIC's effort to apply this maxim mechanically despite explicit statutory language that the powers granted by Section 92 are supplemental to powers granted elsewhere in the National Bank Act is totally without merit. Accordingly, it can be rejected without in any sense slighting those cases where the maxim may have proved an aid to determining legislative intent.

VALIC also attempts to rely upon the legislative background of Section 92 as support for its contention that national banks lack any "insurance agency powers." VALIC Br. 12. However, VALIC's so-called references to the "legislative genesis" of Section 92 are not references to primary sources of legislative history, such as congressional debates or committee reports with respect to the proposed legislation. Instead, VALIC relies upon a letter written by an attorney at the Federal Reserve Board published in the Federal Reserve Bulletin[14] and a letter from Comptroller Williams to Senator Robert L. Owen. VALIC Br. 12-13. Both letters contain only very ephemeral references to insurance agency activities by national banks. Comptroller Williams' letter refers at most to the type of general insurance agency activities that Section 92 proposed to permit national banks to engage in in small towns. Neither letter addresses the sale of any specific product of an insurance company or any specific insurance agency activity. These two documents, therefore, are not dispositive authority with respect to the sale by national

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[14] Indeed, VALIC presents no evidence that this letter was even presented to Congress during its consideration of proposed Section 92.

banks of annuities or of specialized insurance-related products.

Moreover, VALIC cannot dispute that the courts have consistently interpreted Section 92 as not prohibiting the sale as agent of all insurance-related products. *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468, 476-77 (8th Cir. 1984) (upheld order permitting sale of credit-related property and casualty insurance); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1169-71 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) (held that credit life insurance is a "limited special type of coverage" that "in no way" involved the "operations of a general life insurance business"). Similarly, the Comptroller has approved the sale of a number of specialized insurance-related products. *See* NationsBank Br. 46-47.

B. The Comptroller Had a Substantial and Well-Reasoned Basis For His Conclusion That Annuities Were Not Insurance for Purposes of Section 92.

VALIC seeks to establish that when Congress used the term "insurance" in Section 92 it meant annuities irrespective of any functional analysis of the modern-day features of this financial investment product. As support, VALIC relies heavily upon insurance texts, many of which are over a hundred years old. While it may have been appropriate for the authors of these texts to discuss both annuities and life insurance for certain purposes, VALIC substantially distorts and overstates the opinions expressed by these authors when it states: "Insurance scholars largely agree that annuities are insurance . . . ." VALIC Br. 18.

Indeed, a more complete review of insurance texts quoted by VALIC and a number of major texts *not* quoted leads to the conclusion that the following view is at least as representative among modern insurance scholars as the contrary view: "Annuities are not simply a form of life insurance; in fact, they are the opposite of insurance." Allen L. Mayerson, *Introduction to Insurance* 414 (1962).

Accord Frank Joseph Angell, *Insurance* 607 (1959) ("An annuity is the *reverse* of life insurance.") (emphasis in original); Fedrick G. Crane, *Insurance Principles and Practices*, 251 (2d ed. 1984) ("[A life annuity] is the opposite of insurance."); Herbert S. Deneberg, *Risk and Insurance* 287 (1974) ("Annuities are often viewed conceptually as the converse of life insurance."); S.S. Huebner and Kenneth Black, Jr., *Life Insurance* 118 (8th ed. 1972) ("From an economic standpoint life insurance and annuities have been regarded as vastly different from one another."); William R. Vance, *Handbook on the Law of Insurance* 1020 (3d ed. 1951) ("The common form of annuity is entirely different from a life policy."); Charles O. Hardy, *Risk and Risk Bearing* 286 (2d ed. 1931) ("[The life annuity] contract is exactly the reverse of the insurance contract.")

Similarly, a number of the authorities cited by VALIC as supporting its position actually contain other statements that draw fundamental distinctions between annuities and insurance. *See, e.g.*, Vance, *supra*, 88 ("It is generally held that an annuity contract is not a contract of insurance but the insurance laws generally regulate the issuance of annuities and the consideration received for the contract is taxed by many states."); Crane, *supra*, 251; Kenneth Black, Jr. and Harold D. Skipper, Jr., *Life Insurance* 147 (12th ed. 1994) ("Annuities remain exceedingly popular as a means of personal savings in the United States . . . . This enhanced popularity reflects the continuing aging of the U.S. population and the concomitant desire to increase savings in a tax-favored vehicle in anticipation of retirement financial needs.").

VALIC repeatedly states that the purpose of an annuity contract is to provide funds to the contract purchaser at a later point in life. VALIC Br. 18, 20, 21, 22, 26-27, 30-31. As such, an annuity contract is fundamentally indistinguishable from many other financial investments, such as stocks, mutual funds, or zero coupon bonds. This characteristic is in marked contrast to the primary purpose of

a life insurance policy, which is to provide proceeds to those who suffer a loss by reason of an insured's death. While a mortality *calculation* is sometimes used to structure an annuity payout, that method of payout is used less frequently today and is in no sense essential to the function and purpose of an annuity.[15]

By contrast, the pooling of mortality *risk* is the essence of a life insurance contract. Every life insurance policy pays a benefit in the event of the insured's death prior to maturity. While a life insurance contract may have an investment component, as in the case of a whole life policy, that component is not essential to the insurance. VALIC is, therefore, unconvincing in its contention that an annuity contract is essentially an "insurance" contract, at least as the latter term is generally understood.

The courts have similarly concluded in a variety of different contexts that annuities do not constitute insurance for particular purposes. *See, e.g., Helvering v. Le Gierse*, 312 U.S. 531, 542 (1941) (under federal tax law which excludes "amounts receivable as insurance" from decedent's gross estate for tax purposes, annuities are not treated as insurance); *Estate of Keller v. Commissioner*, 312 U.S. 543 (1941) (accord); *In re Sothern's Estate*, 257 A.D. 574, 14 N.Y.S.2d 1 (1939) (annuity contracts are not, within New York tax law exemption, applicable to insurance payable to a designated beneficiary from estate taxes); *In re Rhodes' Estate*, 197 Misc. 232, 94 N.Y.S.2d 406 (N.Y.

[15] VALIC contends that whenever a contract uses a mortality calculation to structure a payout at maturity, such a contract constitutes insurance. VALIC Br. 33. A wide range of contracts frequently provide for payments to be made for life. For example, businesses many times agree to pay employees and their spouses retirement benefits for life. Similarly, individuals entitled to receive a lump sum payment frequently elect to structure such payment in the form of a fixed stream of payments over life. While these contracts may require mortality calculations and perhaps some pooling of mortality risk by the party agreeing to make payment, these contracts are generally not viewed by the parties as "insurance."

Surr.Ct. 1949) (accord); *In re Walsh*, 19 F. Supp. 567 (D. Minn. 1937) (annuity policy owned by bankrupt was not within insurance exemption to Minnesota bankruptcy law and therefore trustee in bankruptcy was entitled to the cash surrender value of the policies); *In re Howerton*, 21 Bankr. 621, 623 (1982) (accord); *Carroll v. Equitable Life Assurance Co.*, 9 F. Supp. 223 (W.D. Mo. 1934) (defendant, a mutual insurance company forbidden by law to issue insurance contracts except by a "mutual plan," was nonetheless authorized to sell annuity contracts without a mutual plan because annuity contracts are investments rather than insurance); *Succession of Rabouin*, 201 La. 227, 9 So. 2d 529 (1942) (insurance is not considered part of the decedent's estate for purposes of the law of "forced heirship," but annuities are part of the estate because they are not insurance).

Even considered in their most favorable light, VALIC's contentions do not establish that the Comptroller acted unreasonably when, consistent with a long line of judicial authority and numerous secondary authorities distinguishing between insurance and annuities, he concluded that annuities were not insurance for purposes of Section 92. At the very most, VALIC demonstrates that some, but certainly far from all, academicians and other authorities may view annuities as insurance for certain purposes and that the States may regulate annuities as insurance for some (but not all) purposes. These facts clearly are not dispositive of this case. It is illustrative that VALIC's flawed contentions have been advanced by the insurance industry in this Court in prior cases under other federal statutes and have been rejected. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *SEC v. United Benefit Life Ins. Co., supra*; *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, supra*. This Court found these arguments unpersuasive at that time and they should again be rejected now.

C. The Comptroller's Approval Is Not a Reversal of a Prior Formal Agency Position.

VALIC states that in 1978 "the Comptroller ruled that a national bank's proposal to broker annuities" violated Section 92. VALIC Br. 4; *see also* VALIC Br. 16-17. As is shown in our Brief, this statement seriously mischaracterizes what was an informal, unpublished letter of a staff member stating "my opinion [of] an arrangement of the kind that you describe . . . ." VALIC Opp. to Cert. App. 1a. Since no formal Comptroller's ruling occurred in 1978, the Comptroller's Approval in this case is not a reversal of a prior formal agency position. VALIC Br. 17.[16]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: October 11, 1994

[16] While both the Comptroller and NationsBank cite certain published interpretive guidance prepared by the Comptroller's staff, neither petitioner has contended that, if the Comptroller were to rule differently from a staff member in another case, such a Comptroller ruling would represent a reversal of the Comptroller's position. *Cf.* OCC Banking Circular No. 205, *reprinted in* [1984-1985 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,314, at 90,973 (July 26, 1985) (staff no-objection positions "should not be regarded as precedents binding on the Comptroller . . . . [and] would not constitute official action by the Comptroller").

(21) (21)

Nos. 93-1612 and 93-1613

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

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NATIONSBANK OF NORTH CAROLINA, N.A., ET AL., PETITIONERS

v.

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EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondent argues (Br. 11-16) that 12 U.S.C. 92 (Supp. V 1993) prohibits national banks outside small towns from selling any sort of "insurance," no matter how closely such sales may relate to the banks' other business. The bulk of respondent's brief (Br. 16-35) then

offers an historical discussion of whether annuities are or are not "insurance." Finally, respondent challenges (Br. 35-49) the Comptroller's conclusion that the sales of annuities proposed by petitioner NationsBank in this case are authorized under the general banking powers statute, 12 U.S.C. 24 Seventh (1988 & Supp. V 1993). These arguments are inconsistent with the language of the statutes involved and the reasonable interpretation of those statutes by the Comptroller.

1. As we explained in our opening brief (at 39-42), Section 92 is a grant of supplemental powers to national banks that operate in small towns, not a restriction on the powers that are conferred on all national banks by other statutory provisions. Respondent argues (Br. 15-16) that the Comptroller must "redraft" Section 92 in order to arrive at that interpretation. To the contrary, the Comptroller's construction follows directly from the language of the statute, which provides that "*[i]n addition to* the powers now vested by law" in all national banks, banks located in small towns "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company." 12 U.S.C. 92 (emphasis added). Respondent, on the other hand, avoids the language of the statute by asserting that Section 92 "bars national banks from acting as agent for 'any' insurance company in the sale of 'insurance.'" Br. 15. Section 92 does not "bar" anyone from doing anything; it is respondent's paraphrase that "redrafts" the statute's language.

Respondent defends its construction of Section 92 by invoking the maxim "*expressio unius est exclusio alterius*." See Br. 11-15. That principle is inapposite here. The general banking powers statute, 12 U.S.C. 24 Seventh, permits national banks to engage in all

activities that are part of or incidental to the "business of banking." Section 92 provides that "[i]n addition," small-town banks may operate general insurance agencies. Respondent argues that because Section 92 affirmatively authorizes national banks in small towns to engage in that activity, Section 24 Seventh cannot independently authorize the sale of any "insurance" product, even when such sales are part of or incidental to the business of banking. That argument is illogical. There is no reason why sales of insurance cannot be authorized by both statutory provisions. The role of Section 92 is not to prohibit national banks generally from acting as agents in the sale of insurance, but to provide that banks in small towns *may* sell fire, life, or other insurance, even when those sales are not otherwise incidental to banking.

2. Respondent devotes the bulk of its submission (Br. 16-35) to a largely historical discussion of whether "annuities" in general are or are not "insurance." Because Section 92 imposes no limitation on bank sales of "insurance" products when such sales are part of or incidental to the business of banking, it is not necessary to resolve that question in the abstract—even though, as our opening submission made clear (at 34-35), "the great weight of authority supports the position that annuities are *not* insurance." *New York State Ass'n of Life Underwriters, Inc.* v. *New York State Banking Dep't*, 632 N.E.2d 876, 881 (N.Y. 1994) (emphasis added). The controlling question in this case is, instead, whether the Comptroller could permissibly conclude that agency sales of annuities of the sort that petitioner NationsBank seeks to market are functionally part of or incidental to the business of banking.

The sort of inquiry appropriate to the resolution of that question is well illustrated by the discussion of

annuities, investment products, and "insurance" in the Comptroller's decision in this case, as well the discussion in our opening brief. See 93-1612 Pet. App. 37a-47a; Gov't Br. 25-38. Those discussions demonstrate that the Comptroller was justified in concluding that in marketing contemporary annuity products in accordance with its proposal, NationsBank would be filling the traditional role of national banks as intermediaries in the purchase and sale of financial investments by bank customers, not setting itself up as a general insurance agency of the sort that Section 92 permits small-town banks to operate.[1]

Respondent does not succeed in impeaching the Comptroller's determination. Much of respondent's general discussion of "annuities" (Br. 18-25), for example, assumes without elaboration that the annuity products in question in this case are of the most traditional type, in which the purchaser must or is expected to take his payout in periodic payments guaranteed to continue throughout his life. As we pointed out in our opening brief (at 32-34), however, such

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[1] In exploring the issue of how contemporary annuity products should be characterized for purposes of contemporary bank regulation, we think that a practical modern text "written by two financial planners and * * * intended primarily to provide 'information on how to position and market annuities'" (Resp. Br. 28 n.12) is a more valuable reference than cases and treatises from the nineteenth and early twentieth centuries. See, *e.g.*, *id.* at 22-23, 25-30. As this Court has remarked in the securities context, "it is not inappropriate that promoters' offerings be judged as being what they were represented to be." *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967) (quoting *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943)).

annuities do not dominate the modern marketplace.[2] Respondent also points out (Br. 26-28) that several variations on the annuity theme have been known for some time, without seriously contesting our primary assertion that today's annuity purchaser is typically an individual seeking tax-deferred accumulation of capital for retirement (primarily an investment objective), rather than an older investor or trustee accepting a lower rate of return in order to obtain a guaranty of lifetime payment (which might be characterized as the purchase of a sort of "longevity insurance"). Finally, respondent argues (Br. 29-30) that many States regulate annuity contracts and their issuers under their insurance laws. Under the Comptroller's approval, however, NationsBank would not be issuing annuities (the primary concern of such state regulation), and it would

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[2] Respondent says (Br. 32) that statistics we offered in partial support of this point are "misleading," but it fails to explain how. Moreover, respondent characterizes our data as "designed to imply that fixed annuities are a trivial portion of the market." *Ibid.*; In fact, the passage that respondent cites (Gov't Br. 33-34 & n.16) primarily contrasts not fixed and variable annuities, but fixed annuities in different phases (accumulation or payout) and with different types of payout provisions (and thus different degrees of mortality risk). Those characteristics of a fixed annuity contract are relevant to whether the purchaser is likely to view it as primarily an investment. Finally, we note that respondents' source for the proposition that fixed annuities account for 75-80% of the contracts purchased cites that proportion as an "[h]istorica[l]" description of the market; in the same paragraph, it notes that variable annuity sales rose from $2.5 billion to $18 billion between 1980 and 1990, and predicts that "[a]s more and more potential investors learn about the benefits of variable annuities, the gulf between the dollars invested in fixed and variable annuities will narrow." D. Shapiro & T. Streiff, *Annuities* 50 (1992).

be required to "comply fully" with "any state laws" governing annuity sales.[3] 93-1612 Pet. App. 47a-48a.

Respondent's brief demonstrates, at most, that annuities have often been thought of as "insurance" products for some purposes, and that in their varying forms they manifest varying degrees of "insurance" characteristics. See, *e.g.*, Br. 18-25; *id.* at 31 n.14 (citing 4 L. Loss, *Securities Regulation* 2534 (Supp. ed. 1969) on the "continuous spectrum" of financial products "from pure insurance through pure investment"). That general proposition offers little guidance, however, for the proper treatment of modern annuity products as a matter of federal banking law. Specifically, respondent offers no reason to reject the Comptroller's fundamental point that the annuities that NationsBank would market, under the approval at issue here, are best characterized as investment products, not insurance policies. The Comptroller's judgments that NationsBank could undertake sales of those annuities in the course of its banking business, and that such annuities should not be classified as "insurance" for purposes of any negative implication that might be read into 12 U.S.C. 92, were well within the discretion afforded him in administering the national

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[3] Although the issue is not presented in this case, we note the Comptroller's position that a State may not prohibit a national bank from engaging in activities it is permitted to conduct under federal law. That issue has arisen, for example, in the context of state restrictions on small-town insurance agency activities authorized by Section 92. See *e.g., Owensboro Nat'l Bank* v. *Moore*, 803 F. Supp. 24 (E.D. Ky. 1992), appeals pending *sub nom. The Owensboro Nat'l Bank* v. *Stephens*, Nos. 92-6330 & 92-6331 (6th Cir.) (argued Sept. 29, 1994); *Barnett Banks of Marion County, N.A.* v. *Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), appeal pending, No. 93-3508 (11th Cir.) (argued Sept. 19, 1994).

banking laws.[4] See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

3. Finally, respondent challenges (Br. 35-49) the Comptroller's conclusion that agency sales of annuity products can be part of or incidental to the "business of banking" within the meaning of 12 U.S.C. 24 Seventh. Respondent's conception of the scope of the banking power is, however, far too narrow. As we have shown (Gov't Br. 16-20), the powers conferred by Section 24 Seventh were intended to be interpreted broadly and pragmatically, and are not limited to only a few specified powers, or to only those powers exercised by banks in the mid-nineteenth century. The authorization to exercise "all such incidental powers as shall be necessary to carry on the business of banking," in the context of a statute that established a national banking system and created the office of the Comptroller to oversee it, must be understood to provide for change, growth, and expansion of the business of banking, under the Comptroller's supervision, to meet the needs of a changing national economy.[5]

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[4] On respondent's persistent contention (see Br. 4-5, 16-17) that the Comptroller's decision in this case is not entitled to deference because it constitutes a "reversal of position" (Br. 17), see our opening brief at 38 n.19, and our reply brief at the petition stage at 3-5.

[5] Respondent contends (Br. 35) that Section 24 Seventh should be understood in the context of an historical "mistrust of the concentrated economic power of banks," exemplified in debates over the First and Second Banks of the United States. But the National Bank Act was passed in the course of financial convulsions caused by the need to finance the Civil War. The successful proponents of the Bank Act were animated, as a leading banking historian puts it, by a vigorous "nationalist enthusiasm." B.

Only a small portion of respondent's argument (Br. 45-48) addresses the Comptroller's actual position in this case: that because annuities of the sort that Nations-Bank would market today are essentially vehicles for investment, agency sales of those annuities fall within national banks' traditional power to help their customers buy and sell investment instruments. See Gov't Br. 20-22; 93-1612 Pet. App. 37a-41a. In disagreeing with that position, respondent relies on its interpretation of New York banking law as of 1838 (Br. 45-46), while dismissing as "unfathomable" (Br. 39 n.20) the authoritative construction of that law (on the precise question at issue here) by New York's highest court in 1994. Similarly, respondent implies (Br. 46) that banks had no power to broker securities for their customers before enactment of the McFadden Act in 1927, while offering neither citation nor response to this Court's prior statements to the contrary. See Gov't Br. 20-21, citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 407-408 & nn.20-22 (1987), and *Securities Indus. Ass'n.* v. *Board of Governors*, 468 U.S. 207, 215 (1984). In any event, respondent cannot dispute that banks' general and incidental powers under Section 24 Seventh now plainly include the "business of dealing in securities and stock," which was specifically recognized by the Glass-Steagall Act in 1933.

Respondent argues (Br. 47-48) that agency sales of annuities cannot fall within banks' power to broker securities and other financial instruments, not only on the ground that annuity contracts are "insurance" for all purposes, but also because annuities are individual

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Hammond, *Sovereignty and An Empty Purse: Banks and Politics in the Civil War* 334 (1970). It seems unlikely that they were gripped, at the same time, by what respondent calls "a mistrust of the concentrated economic power of banks."

contracts that are not traded in the financial markets. The power to act as a broker for securities and stock is not restricted, however, to items that are regularly traded on financial markets; it presumably includes various instruments that are illiquid and irregularly traded, such as stock and debt of privately-held corporations. There is no apparent reason why banks should not be able to undertake the same sort of non-recourse, no-risk intermediary sales with respect to annuity contracts.

Moreover, as we made clear in our opening brief (at 6-7, 32-35), annuities serve largely as vehicles for the tax-deferred investment and accumulation of capital. A typical variable annuity provides the purchaser with a wide variety of investment options during the accumulation phase, like those available from a family of mutual funds. Fee structures and tax penalties will generally provide substantial incentives to keep money invested within the annuity "wrapper" for a mi 'mum period and until the purchaser has reached a certain age; but, subject to those potential expenses, the purchaser is usually entitled to the return of his investment upon demand. Within any given variable annuity, the premium investment is generally highly liquid, being easily moved from one type of investment to another, or into a cash-equivalent investment such as a money market fund. And during the accumulation phase of a variable annuity, the investor bears much or all of the risk associated with the investment of the premium. The fact that annuity contracts themselves are seldom traded is therefore irrelevant to the way annuities are marketed, the way they function, and the way they should be analyzed for purposes of this case. See, *e.g.*, *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 205-211 (1967), and *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959)

(characterizing variable annuities as investment securities for purposes of the federal securities laws).

The proper analysis is a functional one of the sort undertaken by the Comptroller in rendering his decision in this case. See 93-1612 Pet. App. 37a-41a. That analysis led the Comptroller to conclude that the annuities NationsBank seeks to market are sufficiently similar to other financial investments commonly brokered by national banks for their customers so that their sale is part of or incidental to the business of banking. That conclusion is a permissible construction of the national banking statutes committed by Congress to the Comptroller's administration. *Chevron*, 467 U.S. at 843.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1994

(9) (9)

Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Writs of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, et al.,*
IN SUPPORT OF PETITIONERS

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26 pp

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QUESTIONS PRESENTED

1. Whether the court correctly construed Section 92 of the National Bank Act as a limitation on the incidental powers of national banks as determined by the Comptroller, notwithstanding that in the Act Congress expressly conferred on national banks in small towns insurance agency powers that are "in addition to the powers now vested by law in national banking associations."

2. Whether the court below correctly overturned the determination by the Comptroller of the Currency that 12 U.S.C. Section 24 (Seventh) permits national banks to broker annuities, notwithstanding that the Comptroller's interpretation was reasonable and the court's exceptionally narrow construction of the incidental powers of national banks is contrary to the great weight of authority throughout the United States.

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On Writs of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF PETITIONERS

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with Supreme Court Rule 37.3. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States, representing banks located in each of the fifty states and the District of Columbia, banks of all sizes and both national and state-chartered banks. Assets of ABA member banks comprise over ninety percent of the domestic assets of all commercial banks in the country.

The Association of Banks in Insurance, Inc. ("ABI") is a national trade association of financial institutions with an interest in insurance activities. The ABI was organized to protect and further bank insurance powers. Its members include insurance companies, banks, and bank holding companies owning national and state banks, and other companies engaged in the insurance business.

The Bankers Roundtable is a national association whose membership is open to the nation's 125 largest banking companies, which are represented in the Roundtable by the CEOs and highest officers of the companies. Members hold approximately seventy percent of the country's commercial banking assets, operate in virtually every state and employ almost one million individuals. The mission of the Roundtable is to promote the business of banking, to encourage the development of sound banking and financial policies and practices, and to advocate the interests

of its member companies in federal legislative, regulatory and judicial bodies.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 750 federally insured bank and thrift institutions that hold more than eighty percent of all consumer deposits, and more than seventy percent of all consumer credit held by federally insured depository institutions.

The New York State Bankers Association ("NYSBA") is the principal trade associations for the banking industry within that state. The NYSBA participated actively in *New York State Association of Life Underwriters v. New York State Banking Department*, 83 N.Y.2d 353 (1994) ("*NYSALU*"), a case in which the state Court of Appeals unanimously upheld the right of state-chartered banks to sell annuities. Indeed, the litigation arose directly from a NYSBA initiative. The NYSBA thus is uniquely well situated to elucidate the issues decided by *NYSALU* and their relevance to this case. The decision of the Fifth Circuit, if affirmed, would upset the balance between the powers of state and federally-chartered banks in New York, the largest banking market in the country and in those other states in which state chartered banks are authorized to engage in annuity sales and brokerage. It casts a cloud over the power of national banks in New York, including some of the largest banking organizations in the United States, to sell annuities, at the same time that their State-chartered brethren (also some of the nation's largest banking organizations) now are free to do so without limitation. This result is all the more anomalous because the two governing statutes are identical for this purpose, and indeed the state law served as the

model for the National Bank Act.[1] Rules of statutory construction provide that the meaning of a predecessor statute is instructive in interpreting an adopting statute as well.[2]

Even more significant, the continuing vitality of the national bank charter, in New York and other states, will be brought into question if the decision below stands. The Fifth Circuit's narrow construction of the National Bank Act's "incidental powers" clause stands in stark contrast to the progressive, forward-looking reading of the identical language under New York law by the New York Court of Appeals--a difference that cannot fail to be noted by national banks in the highly competitive New York market. Indeed, within the past year at least three New York institutions have surrendered their national charters in favor of a state charter.

In Louisiana, a state statute expressly ties the authority of state-chartered banks to sell annuities to the outcome of this case--and does so by name. La. Rev. Stat. Ann. 6:242 (A)(16). The authority of state-chartered banks to engage in some fashion in the insurance agency business is likewise dependent, in large part, upon the ability of national banks to do so under Sections 24 (Seventh) and 92 of the National Bank Act. The matter has been in litigation in Louisiana for four years with no resolution yet in sight. (*See American Bank & Trust Co. of Opelousas v. Drake*, No. 93-5040 (5th Cir. 1994)(unpublished)). Finally, soon after (and as a direct result of) the decision below, the Insurance

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[1] Symons, The "Business of Banking" in Historical Perspective, 51 Geo. Wash. L.Rev. 676, 689 (1983).

[2] *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 308 (1898).

Commissioner of Louisiana began an inquiry into the insurance and annuities sales activities of all national banks in the state, clearly with a view toward moving to disrupt and preclude those lawful national bank activities.

SUMMARY OF THE ARGUMENT

This case involves what the Fifth Circuit wrongly perceived to be a conflict between two provisions of federal banking law. On the one hand, Section 24(Seventh) of the National Bank Act grants to national banks the power to engage in the business of banking and to exercise "all such incidental powers as shall be necessary" to carry on that business. On the other hand, Section 92 of the Act provides that national banks located and doing business in small towns may act as the agent in the sale of any insurance. Where a particular insurance product is "incidental" to banking, Section 24(Seventh) would seem, in the abstract, to allow all national banks, wherever located, to market that particular product. Section 92, in the abstract, is said to limit the marketing of insurance products--even those "incidental to banking"--to national banks in small towns, to the exclusion of national banks in larger places.

In point of fact, there is no conflict between these two provisions of law. By its own explicit terms, Section 92 directs that its provisions should give way to pre-existing statutory grants of power to national banks and that they are granted "in addition to" those pre-existing powers. Since Section 24 (Seventh) predates Section 92 by over a half-century, and since, properly construed, nothing in Section 92 derogates powers granted by Section 24 (Seventh), it is clear that the "incidental powers" clause of the statute must take precedence here.

Whether or not Section 92 limits the sale of "insurance" by national banks, the second question the Court must address is whether the sale of annuities, as approved by the Comptroller of the Currency in this case, fits within the grant of "incidental powers" to national banks or within the explicit grant of power to national banks to purchase and sell securities, without recourse, solely upon the order, and for the account of, customers. 12 U.S.C. § 24 (Seventh). The court below dismissed this issue in a one-sentence analysis, limited to the "incidental powers" clause of the statute. The court held that even if "the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed "necessary." *Variable Annuity Life Insurance Company v. Clarke*, 998 F.2d 1295, 1302 (5th Cir. 1993) (hereinafter "*VALIC*").

The Fifth Circuit below characterized annuities as insurance products, as if that characterization somehow cast sale of the product beyond the pale of proper banking activities.[3] In point of fact, however, the characterization of an annuity as an insurance product makes it at least as likely, and perhaps more so, that the product does fit within the incidental powers of national banks. In our evolving economy, the banking and insurance industries have become increasingly intertwined since the enactment of Section 92 in a far different era over three-quarters of a century ago. The incidental powers clause of the National Bank Act (or any incidental powers clause), properly understood, is designed to accommodate evolution in the banking industry, not, as the Fifth Circuit would have it, to freeze industry practices

[3] The briefs of both Petitioners in this case point out in detail why this characterization is wrong. No purpose would be served by our repetition of those arguments.

in the mold in effect at the time the applicable law was enacted.

ARGUMENT

I.

SECTION 92 OF THE NATIONAL BANK ACT IS NOT A LIMITATION ON THE INCIDENTAL POWERS OF NATIONAL BANKS

Section 92 of the National Bank Act provides that

> **[i]n addition to the powers now vested by law in national banking associations under the laws of the United States** any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company authorized by the authority of the State in which said bank is located to do business in said State, by soliciting and selling insurance...

Act of Sept. 7, 1916, c. 461, 39 Stat. 753 (emphasis added).

In the written decision of the court below, the opening phrase was omitted when the author set forth the language of the statute was set forth "in relevant part." *VALIC*, 998 F.2d at 1298. Similarly, this language was ignored in the court's logic. This a serious omission, for rather than being outside the "relevant" part of the statute,

it is critical generally to the proper interpretation of the law and specifically to the resolution of the issue before this Court. Its relevance is fundamental, and its exclusion was dispositive, decisive and totally improper. In fact, excluding the opening phrase of Section 92 was prejudicial in the exact sense of the word (See Webster's New Collegiate Dictionary 900 (1980)), as it led to a premature judgment and an unwarranted opinion.

At the time Section 92 was enacted in 1916, one of the powers then--and for the previous fifty-two years--"vested by law in national banking associations under the laws of the United States" was the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Act of June 3, 1864, 13 Stat. 99, § 8. It follows that the explicit grant of power in Section 92 was intended to be "in addition to" those activities that are incidental to the business of banking. The Fifth Circuit, however, simply chose to ignore the opening phrase with its inclusive "in addition to" language. Instead, it determined in conclusory fashion both that annuities are a form of "insurance" and that Section 92 automatically raises a negative inference regarding the power of national banks to sell insurance products in places with larger populations.

The analysis is exactly backwards. Because Section 92 is, by its very terms, an additional power, the court below should have determined first what powers national banks possessed already, to which the small town insurance power would be an addition. In 1916, as today, banks possessed "incidental powers." As we show below, that is, and was intended to be, an evolving concept. No Congress can foresee events decades or centuries in the future. But the Congress is often wise enough to realize this shortcoming and to account for it by deeding to a regulator the authority

to determine, from time to time, what has become "incidental." The plain language of the statute is controlling, *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. 361, 373-75 (1986), and the plain language of Section 92 says that it is an additional power, not a limitation. No mere interpretive maxim can explain away so plan a Congressional command.

We do not claim that the grant of power to national banks to engage in the business of banking and to exercise all incidental powers necessary thereto could overcome explicit federal statutory prohibitions against banks engaging in a particular business or in a particular way. But there is no such prohibition here. Even if there were a conflict between Section 92 and Section 24 (Seventh), which there is not, there still would have to be some principled way to choose which of the two sections actually governed the outcome of this case. The Fifth Circuit purports to follow the rule of statutory construction that a specific statute controls over a general one.[4] However, there is no reason to hold (and the Fifth Circuit recites none) that the term "act as the agent for any fire, life, or other insurance company" found in Section 92 is any more (or less) specific than are the terms "carry on the business of banking" and "purchas[e] and sell [] securities and stock" found in Section 24 (Seventh).

Indeed, if the Fifth Circuit is otherwise correct, the "insurance" provision is even broader and more general than contemplated by the Congress that enacted it. According to the Fifth Circuit, the term "insurance" is general enough to

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[4] *VALIC*, 998 F.2d at 1302 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) and *Busic v. United States*, 446 U.S. 398, 406 (1980).

include--without saying so--a form of annuity that did not even exist until thirty-six years after Section 92 was enacted.[5] If the Fifth Circuit is otherwise correct, the "banking" provision is less general, less broad than contemplated insofar as it does **not** (according to the court below) include the ability to sell something that this Court has already held to be a "security."[6]

II.

THE SALE OF ANNUITIES IS INCIDENTAL TO BANKING

It is a subject of serious and continuing disagreement among the parties to this case whether annuities are "insurance" products or not. The Comptroller of the Currency and NationsBank, supported by a host of judicial precedents from numerous jurisdictions (including this Court), both contend that annuities more nearly resemble traditional banking products or investment products that national banks are specifically authorized to broker by virtue of Section 24 (Seventh) of the National Bank Act. On the other side, VALIC argues, and the Fifth Circuit held, that annuities are historically the product of insurance companies and are regulated as insurance products under the insurance laws of the fifty states. If, however, annuities are not insurance products, then the alleged negative inference

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[5] This Court has pointed out that variable annuities--covered by the Fifth Circuit decision below--did not come into existence until 1952. *SEC v. VALIC*, 359 U.S. 65, 69 (1959).

[6] *Id.*, at 67-68.

drawn from Section 92 is wholly irrelevant to the outcome of this case.

The Petitioners argue in their briefs, and we concur, that the sale of annuities, however characterized, is incidental to the business of banking without regard to restrictions on the sale of insurance, whether embodied in state or federal law. In this regard, the recent unanimous decision of the New York Court of Appeals, construing identical language under New York law, stands in stark contrast to the Fifth Circuit's narrow and antiquated notion of "incidental powers." *NYSALU*, *supra*, 83 N.Y.2d 353 (1994). As previously noted, the "incidental powers" clause of the National Bank Act was derived directly from and is identical to the provision of New York Banking Law at issue in *NYSALU*. Compare 12 U.S.C. Section 24 (Seventh) with New York Banking Law Section 96. The approach of the New York Court is thus particularly instructive.

In language strikingly similar to that of the Fifth Circuit below, the lower court in New York had held that "the incidental powers language must be construed as allowing only such activity as is necessary to put into effect the express powers authorized by the statute...the selling of annuities is not such an activity." On appeal, the Appellate Division, Third Department, of the New York Supreme Court unanimously reversed that reading, and on March 30 of this year, the Court of Appeals unanimously affirmed the Appellate Division. Noting that it had consistently rejected such a narrow reading since its landmark decision in *Curtis v. Leavitt*, 15 N.Y. 9 (1857), the court held that "...the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service...care should be taken not to cripple [banks] by a narrow and unreasonable

construction of the statutes which will unwisely limit their usefulness in the transaction of business under modern conditions (citations omitted)."

Even assuming, for purposes of argument only, that annuities are insurance products, that does not mean, ipso facto, that they are not "incidental" to banking. Indeed, quite the converse is the case.

According to the Fifth Circuit, "[p]rior to the 1916 enactment of Section 92 it seems to have been universally understood that no national banks possessed any power to act as insurance agents." *VALIC v. Clarke*, 998 F.2d at 1303 (citing the Fifth Circuit's own opinion in *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010, 1013 (5th Cir. 1968)). What may have been true in 1916 is, however, not true today. If the banking industry had not, by 1916, evolved to the point where selling of some form of insurance was included within the "incidental powers" of national banks, those banks have, since then, evolved past that point. The incidental powers clause of the statute allows for such evolution, and national banks did, of course, possess "incidental powers" in 1916 and had for over fifty years. As the Ninth Circuit has held, the National Bank Act "did not freeze the practices of national banks in their nineteenth century forms....[T]he powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).[7] If banking is not to be "frozen" in the distant past,

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[7] In a nonbanking context, this Court has adopted a similarly broad view of the administration of federal regulatory statutes: "Flexibility and adaptability to changing

then logically there must come a time when a practice that was once not "incidental" becomes "incidental."

Today, as many as thirty-four states allow their own state-chartered banks to engage in the insurance agency business in some form or another.[8] That is an important consideration in construing the incidental powers clause of the National Bank Act, since this Court has held that a power is incidental if it is a "generally adopted method" of banking. *Colorado National Bank v. Bedford*, 310 U.S. 41, 50 (1940). The laws authorizing such powers in Indiana and in Delaware have been upheld by the federal courts over the objection of the insurance industry and even (in the case of Delaware) of the Board of Governors of the Federal Reserve System. *See*, *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 111 S.Ct. 44 (1990); *Citicorp v. Board of Governors of the Federal Reserve System*, 936 F.2d 66 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 869 (1992). State courts have also regularly upheld laws granting insurance agency powers to commercial banks and

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needs...is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile and changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967). The decision of the Comptroller of the Currency is clearly consistent with this philosophy.

[8] See Appendix attached hereto.

other depository institutions. *See, e.g.*, *Calfarm v. Deukmejian*, 48 Cal.3d 805 (1989); *Independent Insurance Agents of Ohio v. Fabe*, 63 Ohio St.3d 310, 587 N.E.2d 814 (1993); *Ludington Service Corp. v. Commissioner of Insurance*, 444 Mich. 481, 511 N.W.2d 661, *reh'g denied*, 444 Mich. 1240 (1994). In upholding the power of New York banks to broker annuities, the State's highest court also upheld the Banking Department's opinion that under New York law a New York State-chartered bank may own a subsidiary engaged in any line of business that is not otherwise unlawful, arguably including an insurance agency, with prior approval of the State's Banking Board. *NYSALU*, *supra*, 83 N.Y.2d 353. National banks may act as the agent in the sale of credit life insurance. *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). National banks may operate a subsidiary for the purpose of issuing municipal bond insurance under the incidental powers clause of the National Bank Act. *American Insurance Association v. Clarke*, 865 F.2d 278 (D.C. Cir. 1989); National banks may offer debt cancellation contracts to their customers, *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990), even though such contracts constitute "insurance" for purposes of the relevant state law, *Douglas v. Dynamic Enterprises*, 315 Ark. 575, 869 S.W.2d 14 (Ark. 1994). National banks have and exercise the powers granted by the law under consideration here to act as agent in the sale of insurance from small town offices to customers wherever found. *Independent Insurance Agents of America v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

Many banks, both state and national, are affiliated with insurance agencies by virtue of common ownership by a bank holding company. Bank holding companies may

engage in the general insurance agency business in small towns so long as they have a lending office there. *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 835 F.2d 1452 (D.C. Cir. 1987). Prior to the enactment of amendments to the Bank Holding Company Act in 1970 and 1982, a number of bank holding companies were engaged in the insurance agency business; those companies were allowed by law to remain in the business and, in some cases to expand their insurance agency businesses, after the amendments to the Act were passed. Bank holding companies retain their "grandfathered" rights to operate insurance agencies after acquisition by non-grandfathered holding companies. *National Association of Casualty and Surety Agents v. Board of Governors of the Federal Reserve System*, 856 F.2d 282, *on denial for petition for reh'g and reh'g en banc*, 862 F.2d 351 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989). A bank holding company with a grandfathered insurance agency business may offer title insurance even if it was not offering that product on the grandfather date. *American Land Title Association v. Board of Governors of the Federal Reserve System*, 892 F.2d 1059 (D.C. Cir. 1989). A grandfathered insurance agency can be reinstated even if it had been allowed to lapse. *The Glastonbury Company v. Gillies*, 550 A.2d 8 (Conn. 1988).

Nor is the growing coalescence between the banking industry and the insurance industry by any means a one-way street. A considerable number of companies already engaged in the insurance business in some form have, within the last several years, created or acquired commercial banks. Most prominent examples among these would include Sears, Roebuck and Company, which has long owned Allstate Insurance Co., and, also owned the Greenwood Trust Company of New Castle, Delaware, a $7.5 billion asset bank

which issues the Discover Card. American Express, which owns the Fireman's Fund Insurance Companies, likewise owns three commercial banks--IDS Trust Co., Minneapolis, American Express Bank International, New York, and American Express Centurion Bank in Newark, Delaware. Beneficial Corporation owns a dozen insurance companies directly or indirectly, which are engaged in both underwriting and selling of insurance as agents. It also owns Beneficial National Bank of Wilmington, Delaware. Control Data Corporation, with eleven insurance subsidiaries, owns Primerica Bank of Newark, Delaware. Prudential Insurance Company owns Prudential Bank & Trust Co. of Atlanta.

All of the above developments are of more recent vintage than 1916. What was or may not have been "generally adopted" at the time of enactment of Section 92 of the National Bank Act has been "generally adopted" in large measure by the banking industry of 1994.

The briefs of the Comptroller and NationsBank have elaborated upon the similarities between annuities and various other banking products in order to show that annuity sales are a part of the business of banking or are that they are incidental to that business. To the extent that annuities may resemble "insurance" products, that factor, too, supports a finding that the sale of annuities is incidental to the business of banking as it is practiced in a modern economy, regardless of whether it would have been included in the business of banking as it was practiced before the First World War.

CONCLUSION

For all of the reasons above, your amici respectfully urge the Court to reverse the decision of the Fifth Circuit below.

Respectfully submitted,

/s/

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Michael F. Crotty
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Attorneys for Amici Curiae

July 29, 1994

AMERICAN BANKERS ASSOCIATION
Office of the General Counsel
June 23, 1994

SUMMARY OF PRODUCTS AND SERVICES AUTHORIZED BY STATE LAW OR REGULATION

	INSURANCE				REAL ESTATE		SECURITIES				TRAVEL	DATA	MGMT.
STATE	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	AGENCY	PROCESS.	CONSULT.
AL	Y	Y	Y	Y	Y	Y	Y	N	N	N	Y	Y	Y

Authority for most activities is incidental powers provision, § 5-5A-18(12). Insurance underwriting and discount securities brokerage must be in a separate subsidiary. Travel agency, data processing, and management consulting source is § 5-5A-18(9).

STATE	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
AK	Y	Y									Y		

Authority is in Administrative Code at Tit. 3, § 02.145.

STATE	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
AZ					Y				Y	Y			

Real estate activities are limited to bank subsidiaries. § 6-184. Securities underwriting and dealing are limited to public entity issues and notes and obligations secured by realty, secured mortgage-related payment bonds, and commercial paper and must be done through a non-bank subsidiary. § 6-193. Creation and operation of mutual funds are permitted by § 6-193.

STATE	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
AR	Y	Y			Y						Y		

Agent authority for places with up to 5000 population and grandfather authority for licenses for agents and brokers held on 3/25/75 are at § 23-64-203(b). Authority for real estate investment, direct or through bank or bank holding company subsidiaries, is §§ 23-32-708(p), (q). Travel agency authority is § 23-32-701(b)(13).

STATE	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
CA	Y	Y	N	Y	Y	N	N	N	N	Y			Y

California Supreme Court opinion of 5/4/89 upheld provisions of Prop. 103 (1988 referendum) permitting banks to be licensed as insurance agents and brokers. State Banking Dep't opinion ruled that §§ 772(b) and 1208 of Financial Code are repealed by Prop. 103. Insurance Department Bulletin 85-13 regulates insurance lobby leasing. Authority for real estate investment is § 751.3, Fin. Code; authority for mutual funds is § 1338. Management consulting derives from §§ 777, 778.

STATE	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
CO	Y				Y								

Authority for insurance sales for BHCs and subsidiaries in places up to 5000 population and for grandfathering of sales by banks, BHCs, and subsidiaries as of 7/1/77 is §§ 10-2-221 and 11-6-101. Real estate investment authority, direct or through subsidiaries, is §§ 11-7-106. Authority to sell fixed and variable annuities §§ 10-2-221(2)(a), 10-2-221.5, 10-2-602, 10-2-603.

STATE	INSURANCE: Sales	INSURANCE: Brokerage	INSURANCE: Under-writing	INSURANCE: Lobby leasing	REAL ESTATE: Equity invest.	REAL ESTATE: Sales broker	SECURITIES: Discount	SECURITIES: Full service	SECURITIES: Under-write	SECURITIES: Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
CT	Y												
DE	Y		Y				Y	Y	Y	Y			
FL	Y				Y								
GA	Y			Y	Y				Y	Y			
IN	Y								Y	Y			
IA	Y	Y	N	N	Y	Y	Y	Y	Y	Y	N	N	N
KS	Y						Y	Y	Y	Y			

CT

Fire and casualty insurance sales permitted by banks, BHCs, and subsidiaries licensed on 10/1/73, and life insurance as of 10/1/80, are authorized by § 38-72a.

DE

Authority for banks to sell and underwrite insurance nationwide is Tit. 5, § 761(14), approved 5/30/90. Federal Reserve order has halted sales pending litigation. Tit. 5, §§ 761 (a)(12), 761 (a)(13) authorize banks, directly or through subsidiaries, to underwrite, distribute, or deal in securities of all kinds.

FL

Insurance agency permitted in banks in city of less than 5000 population; bank agencies as of 4/2/74 are grandfathered, and sale of annuities as authorized for national banks is permitted by § 626.988. Investment authority under § 658.67(6) is basis of real estate equity investment.

GA

Insurance sales only in places up to 5000 population and grandfather of sales by bank, bank holding companies, and subsidiary or affiliate licensees on 1/1/74 are authorized by § 33-3-23. Authority for lobby leasing is Insurance Commissioner's guidelines of 10/1/86. Banks may acquire, directly or indirectly, an equity interest in the financing, development, or improvement of real estate up to 25% of the appraised value of the real estate. § 7-1-286. Securities underwriting is limited to banks with fiduciary powers participating in an underwriting syndicate. §§ 7-1-314, 7-1-612. Investment in mutual funds and corporations that offer investment advice and investment products is permitted by §§ 7-1-287, 7-1-288.

IN

Source of insurance sales authority, for lines other than life insurance is § 28-1-11-2. Section 28-1-11-4 permits banks to underwrite securities backed by municipal bonds and by interests in mortgages, and also to sell, distribute, and underwrite mutual funds through a subsidiary.

IA

Source of insurance and real estate powers, either directly or through a bank service corporation, is Banking Superintendent's letter of 11/15/83. Investment in real estate for industrial and economic development purposes is limited to 20% of capital and surplus for a single purchase and 40% in the aggregate. § 524.901. Section 524.825 authorizes state banks to engage in any aspect of the securities industry directly or through subsidiaries.

KS

Source of insurance sales in places with up to 5000 population is State Bank Commissioner Special Order 1990-2, issued pursuant to wild card statute (§ 9-1715). Securities brokerage in a bank is limited to financial futures, forward placements, and standby contracts on U.S. government securities, but full-service brokerage, underwriting, and operating mutual funds may be engaged in through a subsidiary. § 9-1101.

<table>
<tr><th></th><th colspan="4">I N S U R A N C E</th><th colspan="2">R E A L E S T A T E</th><th colspan="5">S E C U R I T I E S</th><th>TRAVEL</th><th>DATA</th><th>MGMT.</th></tr>
<tr><th>STATE</th><th>Sales</th><th>Brokerage</th><th>Under-writing</th><th>Lobby leasing</th><th>Equity invest.</th><th>Sales broker</th><th>Discount</th><th>Full service</th><th>Under-write</th><th>Mutual fund</th><th>AGENCY</th><th>PROCESS.</th><th>CONSULT.</th></tr>
<tr><td>KY</td><td>Y</td><td>Y</td><td></td><td></td><td>Y</td><td>Y</td><td>Y</td><td></td><td></td><td></td><td>Y</td><td></td><td></td></tr>
<tr><td></td><td colspan="13">Persons owning up to one-half of the capital stock of a bank before 7/13/84 may act as agent or broker. § 287.030. Real estate investment is limited to local market area or improvements on realty acquired in satisfaction of debt, § 287.100. Real estate brokerage activity is authorized by O.A.G. 79-399. Discount brokerage and travel agency authority is also § 287.100.</td></tr>
<tr><td>LA</td><td>Y</td><td>Y</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td></td><td colspan="13">Bank general insurance agents or brokers on 1/1/84 are grandfathered by § 6:121 B (2). Annuities sales authorized by Commissioner of CFI on 3/16/93; rule invalidated pursuant to resolution of <u>VALIC v. Clarke</u> in 5th Circuit.</td></tr>
<tr><td>ME</td><td>Y</td><td>Y</td><td></td><td>Y</td><td>Y</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td></td><td colspan="13">Insurance sales and brokerage limited to ownership interest up to 25%; lobby lease required to be at arm's-length. Tit. 24-A, § 1514-A. Annuities sales were authorized by the 1993 legislature. Real estate equity investment limited to savings banks and trust companies. Tit. 9-B, §§ 542, 641. Special requirements for broker-dealers transacting business on premises of financial institutions, broker-dealer may not employ any person also employed by the financial institution as a sales rep and may not compensate financial institution employees for referring customers, adopted 6/1/94 by Maine Securities Division.</td></tr>
<tr><td>MA</td><td>Y</td><td>N</td><td>N</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>N</td><td>N</td><td>N</td><td>N</td><td>Y</td><td>Y</td></tr>
<tr><td></td><td colspan="13">Insurance sales are through non-profit SBLI Corp. Insurance agents and brokers licenses held on 10/11/82 permitted by Ch. 175, § 174E. The guidelines for leasing of space by banks to insurance agents are contained in 211 CMR 53.00, issued 4/28/89. Real estate activities authority is Ch. 167F, § 2(8). Securities, data processing, and management consulting are available under leeway statute. Ch. 167F, § 3(4), (5).</td></tr>
<tr><td>MI</td><td>N</td><td>N</td><td>N</td><td>N</td><td>Y</td><td>N</td><td>Y</td><td>Y</td><td>N</td><td>N</td><td>Y</td><td>Y</td><td>N</td></tr>
<tr><td></td><td colspan="13">§ 151d, M.C.L., authorizes data processing services and other activities and investments deemed appropriate by the Commissioner; § 151f, authorizes securities brokerage; and 151g, authorizes investment of up to 10% of assets in real estate purchase, development, improvement and construction. Michigan Bankers Association counsel suggests national bank travel agency power is available to state-chartered banks.</td></tr>
<tr><td>MN</td><td>Y</td><td></td><td></td><td></td><td>Y</td><td></td><td>Y</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td></td><td colspan="13">Insurance sales and securities discount brokerage are engaged in, though neither is expressly authorized or prohibited. Real estate equity investment is limited by § 48.61.</td></tr>
<tr><td>MS</td><td>Y</td><td></td><td></td><td>Y</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td>Y</td><td></td></tr>
<tr><td></td><td colspan="13">Insurance sales allowed in places of 7000 or fewer residents; differs from federal rule. § 83-17-229. Regulation 89-101, effective 5/6/89, permits the leasing of space by lending institutions to insurance agents. Source of data processing authority is §81-5-1(9).</td></tr>
</table>

<table>
<tr><th></th><th colspan="3">I N S U R A N C E</th><th colspan="3">R E A L   E S T A T E</th><th colspan="4">S E C U R I T I E S</th><th>TRAVEL</th><th>DATA</th><th>MGMT.</th></tr>
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<tr><td>MO</td><td>Y</td><td></td><td></td><td>Y</td><td>Y</td><td></td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td></td><td>Y</td><td></td></tr>
<tr><td></td><td colspan="13">Banks in places up to 5000 population by implication have same insurance agency powers as national banks. Authority for lobby leasing is a regulation at 4 C.S.R. § 140-2.051. Real estate equity investment authority is at § 362.106. Establishment and sales of mutual funds are authorized by § 362.105. Data processing services are authorized by § 362.105. Underwriting of mutual funds and public and private bonds and discount brokerage services are authorized by regulation, 4 C.S.R. § 140-2.130.</td></tr>
<tr><td>NE</td><td>Y</td><td>Y</td><td>N</td><td>Y</td><td>N</td><td>N</td><td>Y</td><td>N</td><td>N</td><td>N</td><td>Y</td><td>Y</td><td>Y</td></tr>
<tr><td></td><td colspan="13">Insurance sales and brokerage are allowed in places with 200,000 or fewer residents. § 44.392. Lobby leasing permitted in a normal lessor-lessee relationship. § 44-392. Discount brokerage, travel agency, data processing, and management consulting are permitted under the general terms of § 8-101(4).</td></tr>
<tr><td>NV</td><td>N</td><td></td><td></td><td></td><td>Y</td><td>N</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td></td><td colspan="13">Annuities sales authorized by 1993 A.B. 756. Insurance agency is prohibited by § 662.235(2). Real estate investment is allowed by § 662-103.</td></tr>
<tr><td>NH</td><td>N</td><td>N</td><td>N</td><td></td><td>N</td><td>Y</td><td>Y</td><td>N</td><td>N</td><td>N</td><td>N</td><td>Y</td><td>N</td></tr>
<tr><td></td><td colspan="13">Authority for real estate sales and brokerage, discount securities brokerage, and data processing is state wild card statutes and parity statutes that, respectively, give banks parity with savings banks and with national banks. §§ 394A:1, 394A:11.</td></tr>
<tr><td>NJ</td><td>Y</td><td>Y</td><td>Y</td><td></td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td></td><td></td><td>Y</td><td>Y</td><td></td></tr>
<tr><td></td><td colspan="13">Pursuant to leeway statute, regulations permit insurance brokerage and agency, underwriting credit insurance, real estate investment and brokerage, investment brokerage and advice, travel agency, and data processing either directly or by investing up to 3% of the banks assets or 50% of its capital, surplus, reserves and undivided profits in subsidiaries. N.J. Admin. Code § 3:11-11.5, 18 N.J.R. 1370(b). Ch. 17:9A-24.9(8) authorizes banks to engage in activities authorized by Federal Reserve Board by rule and application.</td></tr>
<tr><td>NM</td><td>Y</td><td></td><td></td><td>Y</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td></td><td colspan="13">Insurance sales in communities up to 5000 population and agencies licensed on 5/1/79 are permitted by § 59A-12-10.</td></tr>
<tr><td>NY</td><td>Y</td><td></td><td></td><td></td><td>N</td><td></td><td></td><td></td><td></td><td></td><td></td><td>Y</td><td></td></tr>
<tr><td></td><td colspan="13">Insurance sales are limited to savings bank life insurance, § 235(26) of Banking Law; sale of fixed and variable rate annuities authorized by opinion of State Banking Department on May 17, 1991 annulled by trial court 7/8/92; trial court reversed by Appellate Division, 6/3/93. Court of Appeal confirmed right to sell annuities 3/30/94. Authority for real estate investment power expired 6/30/88. Travel agency authorized by § 96(13).</td></tr>
</table>

STATE	INSURANCE Sales	INSURANCE Brokerage	INSURANCE Under-writing	INSURANCE Lobby leasing	REAL ESTATE Equity invest.	REAL ESTATE Sales broker	SECURITIES Discount	SECURITIES Full service	SECURITIES Under-write	SECURITIES Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
NC	Y						Y						
ND	Y						Y	Y					
OH	Y	Y	N	N	Y	N	Y	Y	Y	N	Y	Y	Y
OK									Y				
OR	Y				Y	N				Y			
PA	N				Y				Y				
RI	N	N			Y								
SC	Y												

NC

Insurance sales and securities dealing are permitted under incidental powers provision (§ 53-43).

ND

The State Banking Board, on 4/15/90, authorized state-chartered banks to sell fixed rate and variable rate annuities pursuant to § 6-03-38 which authorizes banks to engage in the same activity as national banks. Authority for securities activities is Securities Commissioner Release 83-1 (7/1/83) and § 6-03-02 (1987).

OH

Subsidiaries of state chartered banks may act as agents for sales of insurance other than life products. _Ind. Ins. Agents of Ohio v. Fabe_, ___ Ohio St.3d ___, April 1, 1992. Real estate investment is authorized by §§ 1107.05, 1151.27. Securities activities are permitted by Banking Superintendent General Information Letter (GIL), 83-6. Investment advice and underwriting must be conducted through a subsidiary. Authority for travel agency is § 1107.31. General Information Letter (GIL) 83-3 permits data processing services, and GIL 83-2 permits management consulting.

OK

Tit 6, § 806 permits banks to underwrite investment quality debt and equity, money market mutual funds, and mutual funds limited to investment quality debt, consistent with FDIC rules.

OR

Sections 707.310, 708.430 permit insurance agency activity either directly or in subsidiaries, and §708.43 permits real estate equity investment until 1/1/92 but bars brokerage. OAR 441-530-040, effective 8/19/91, permits banking institutions to contract with securities broker-dealers for services and to engage in the sale of mutual funds and interests in unit investment trusts.

PA

Banks and financial institutions may not be licensed as insurance agents except for sales of credit insurance. Tit. 40, §281. 1988 S.B. 979 permits state banks to invest up to 1% of assets in real estate; securities underwriting is limited to municipal revenue bonds and mortgage-backed securities. Other permissible financially-related investments may be determined by the Commissioner.

RI

Banks and financial institutions are prohibited from being licensed as insurance agents or brokers except for sale of credit insurance. §27-3-46(a). Real estate investment is authorized by § 19-9-11.

SC

Authority for insurance agency through ownership of stock in subsidiary corporations is investment provision of S.C. Code Regs. 15-1(7).

STATE		INSURANCE			REAL ESTATE		SECURITIES				TRAVEL	DATA	MGMT.
	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	AGENCY	PROCESS.	CONSULT.
SD	Y	Y	Y	Y	Y								

Sec. 51A-4-4 permits banks directly or through subsidiaries, to engage in all aspects of insurance. Real estate equity investment is limited to minority interests in farm land. § 51A-4-37.

TN	Y	Y		Y	Y			Y	Y	Y			

Insurance sales and brokerage by BHC and subsidiaries as of 5/14/73, ownership of insurance agency or brokerage by BHC on 1/1/67 that controlled a bank that became part of BHC, and sales by agents continuously affiliated since 6/30/68 are permitted by § 56-6-201. Lobby leasing to insurance agents is permitted by a rule issued by the Insurance Commissioner, effective 2/15/85. Investment in real property is permitted by § 45-2-607(9). 1989 Chapter 168 authorizes state banks to provide investment advice and to sell and underwrite securities. The Commissioner may require that underwriting be done in a subsidiary.

TX	Y											Y	

Insurance agent's licenses held by banks and BHCs on 6/1/81 or applied for by 7/15/81 are grandfathered by Art. 21.07-3(5)(h) of Insurance Code. Data processing is permitted under statutes giving state chartered banks powers equal with national banks.

UT							Y	Y	Y			Y	Y

Authority for discount brokerage, securities underwriting limited to public entity issues, data processing, and management consulting is §§ 7-3-10 and 7-3-17, giving state banks parity with national banks and bank holding companies and authorizing any activity closely related to banking that is not inconsistent with Federal Reserve Board regulations or rulings. Section 7-3-3.2 permits a bank to purchase, sell, underwrite, and deal in securities for its own account or as agent or broker, through a subsidiary, and subject to approval of the Commissioner.

VT	N						Y	Y	Y	Y		Y	Y

Lending institutions may not be licensed as insurers or directly sell insurance other than credit or mortgage insruance. Tit. 8, §4811(a). Authority for securities powers, data processing, and management consulting is Tit. 8 §606.

VA	Y				Y		Y						

All state-chartered banks are permitted to sell insurance. §§ 38.2-513, 38.2-514, 38.2-1824. Discount securities brokerage is permitted under incidental powers clause, § 6.1-11. Real estate equity investment is permitted by § 6.1-59.1.

STATE	INSURANCE Sales	Brokerage	Under-writing	Lobby leasing	REAL ESTATE Equity invest.	Sales broker	SECURITIES Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
WA	Y			Y	Y	N	Y	Y	Y	Y	N	Y	Y

Banks may act as general insurance agents statewide if either the head office or a full service branch is located in a city of less than 5,000 persons. Trust companies may act as agents for any purpose, including general insurance agents. Supervisor of Banking regulations interpreting §§ 30.04.215(1), 30.08.140(10) and 30.08.150(3), effective 6/1/90. Real estate equity investment is permitted by § 30.04.212. Section 30.04.127 allows banks to carry on activities approved by the Supervisor based on public need and financial and managerial ability. The act also repeals the state's mini-Glass Steagall Act and prohibits travel and general insurance agency activities.

STATE	INSURANCE Sales	Brokerage	Under-writing	Lobby leasing	REAL ESTATE Equity invest.	Sales broker	SECURITIES Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
WV	N	N	N		Y	N	Y	Y	Y		Y	Y	Y

Insurance agency, brokerage and underwriting, as well as real estate brokerage, are prohibited by § 31A-8C-2(f). Real estate equity investment, securities activities, and other financially related services as determined by the Commissioner are authorized by §§ 31A-8C-1 - 31A-8C-5.

STATE	INSURANCE Sales	Brokerage	Under-writing	Lobby leasing	REAL ESTATE Equity invest.	Sales broker	SECURITIES Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
WI	Y	Y	N	Y	Y	Y	Y	Y		Y		Y	Y

Insurance sales and brokerage are permitted by § 221.04(9) and Banking Letter No. 38, 11/28/83. Securities powers are permitted by Administrative Code §§ SEC 4.05, 4.10. NOTE: Sec. 221.297 allows a bank to undertake any activity or offer any product, directly or through a subsidiary, that the Commissioner finds is financially related; insurance underwriting is not available under § 221.297. Commissioner's regulations under § 221.297 permit real estate brokerage as of 7/1/87. Real estate equity investment is authorized by § 221.295(2).

STATE	INSURANCE Sales	Brokerage	Under-writing	Lobby leasing	REAL ESTATE Equity invest.	Sales broker	SECURITIES Discount	Full service	Under-write	Mutual fund	TRAVEL AGENCY	DATA PROCESS.	MGMT. CONSULT.
WY	Y	Y					Y						

Insurance agency and brokerage may be authorized by the State Examiner. Discount brokerage is permitted by Sec'y of State Opinion Letter 83-1, 7/1/83.

STATE	INSURANCE			REAL ESTATE			SECURITIES				TRAVEL	DATA	MGMT.
	Sales	Brokerage	Under-writing	Lobby leasing	Equity invest.	Sales broker	Discount	Full service	Under-write	Mutual fund	AGENCY	PROCESS.	CONSULT.
	35	15	4	13	26	7	22	14	15	12	9	15	10

TOTALS -- This table shows the number of states authorizing banks and/or bank subsidiaries to engage in each activity under certain conditions. Totals shown here reflect even partial authority in one of the named areas. For example, Indiana is included in the total for insurance sales, even though those activities are limited to lines other than life insurance.

G:\YES-NO

(10)

Nos. 93-1612, 93-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A. and
NATIONSBANC SECURITIES, INC.,
Petitioners,
v.
VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF
CONFERENCE OF STATE BANK SUPERVISORS,
COMMUNITY BANKERS ASSOCIATION
OF NEW YORK STATE,
FLORIDA BANKERS ASSOCIATION,
INDEPENDENT BANKERS ASSOCIATION
OF AMERICA,
INDEPENDENT BANKERS ASSOCIATION OF TEXAS,
KENTUCKY BANKERS ASSOCIATION,
MISSISSIPPI BANKERS ASSOCIATION,
SAVINGS & COMMUNITY BANKERS OF AMERICA,
TEXAS BANKERS ASSOCIATION,
and WESTERN INDEPENDENT BANKERS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 93-1612, 93-1613

NATIONSBANK OF NORTH CAROLINA, N.A. and
NATIONSBANC SECURITIES, INC.,
Petitioners,
v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF
CONFERENCE OF STATE BANK SUPERVISORS,
COMMUNITY BANKERS ASSOCIATION
OF NEW YORK STATE,
FLORIDA BANKERS ASSOCIATION,
INDEPENDENT BANKERS ASSOCIATION
OF AMERICA,
INDEPENDENT BANKERS ASSOCIATION OF TEXAS,
KENTUCKY BANKERS ASSOCIATION,
MISSISSIPPI BANKERS ASSOCIATION,
SAVINGS & COMMUNITY BANKERS OF AMERICA,
TEXAS BANKERS ASSOCIATION,
and WESTERN INDEPENDENT BANKERS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

Discharging his statutory authority to administer the federal banking laws, the Comptroller of the Currency ruled that petitioner NationsBank may sell annuities

through its subsidiary. Respondent VALIC, a competing annuities distributor, challenged the Comptroller's determination. The district court properly deferred to and upheld the Comptroller's ruling. *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991); reprinted at App. 29a.[1] According no deference to the Comptroller's reasoned interpretation of the National Bank Act, the Court of Appeals for the Fifth Circuit thereafter reversed, ruling that 12 U.S.C. § 92 (Supp. V 1993)—which expressly authorizes banks located in small towns to "act as the agent for any fire, life, or other insurance company"—impliedly precludes national banks located outside small towns from selling annuities, notwithstanding any authorization that national banks might have to do so under 12 U.S.C. § 24 Seventh (1988 & Supp. V 1993). App. 1a. In the absence of an express statutory prohibition on the sale of annuities by national banks, the appellate panel improperly undertook a de novo review of the law and its sparse legislative history and reversed the district court judgment. Four judges strenuously dissented from the court's subsequent refusal to rehear the case *en banc*, stating that the panel had improperly substituted its own view of the Act for the Comptroller's and moreover had "badly erred" in its interpretation of the statutes. App. 20a, 22a.

This case involves the interpretation of a statute—the National Bank Act (the "Act")—that is more than 130 years old, together with an early twentieth century

[1] The petitioners in these consolidated cases are NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc., hereafter collectively referred to as NationsBank, and the United States and the Comptroller of the Currency. Citations to the appendices to the petition of NationsBank in No. 93-1612 are denoted by "App." No joint appendix has been filed in this case.

Pursuant to Supreme Court Rule 37.3, *amici* have requested and received consent to file this brief from counsel for petitioners and from counsel for respondent Variable Annuity Life Insurance Co. The original letters of consent to the filing of this brief have been filed with the Clerk of this Court.

amendment, and their application to contemporary financial products. The court of appeals refused to recognize that Congress has provided a flexible scheme that allows the business of banking to evolve to meet the changing needs of the marketplace. Fixing instead upon a single provision of the Act that grants *additional* powers to certain banks (*i.e.*, those that are located in communities with populations less than 5000), 12 U.S.C. § 92, the court of appeals would impose restrictions that are not expressed in the Act on all national banks in all other locations. The court of appeals accorded no deference to the Comptroller's expert analyses under Sections 24 Seventh and 92, ignoring the design and objectives of the Act as well as the fundamental role of the Comptroller in administering the Act.

Amici support the petitioners in urging this Court to reverse the judgment below.

INTEREST OF THE *AMICI CURIAE*

Amici include the national association of state banking regulators—the Conference of State Bank Supervisors —and national, regional, and state trade associations for the financial services industry representing financial institutions of all sizes and types. The member institutions of *amici* associations are located in every state and the District of Columbia, and in major financial centers as well as in small communities and rural areas.

The *Conference of State Bank Supervisors* (CSBS) is the professional association of state government officials responsible for chartering and regulating more than 8000 state-chartered banking institutions in the fifty states and in Guam, Puerto Rico, and the Virgin Islands. CSBS joins this brief out of specific concern about the important policy consequences of the court of appeals' decision. In particular, the court of appeals' decision would have an indirect effect on the financial strength and competi-

tiveness of state-chartered banks, because many such banks operate under state laws (so-called wild card statutes) that grant state banks the same powers as are held by national banks. The court of appeals' decision in this respect affects the supervisory authority of bank regulators over state-chartered banks.

The remaining *amici* are associations representing many financial institutions that sell annuities. These *amici* and their members are directly and adversely affected by the court of appeals' decision. If allowed to stand, the decision will have an immediate and destructive effect upon the substantial busines of bank sales of annuities. Some institutions represented by *amici* have been marketing annuities for nearly a decade, in accordance with long-standing decisions of the Comptroller. *See, e.g.*, OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985). *Amici* include the following national and state associations whose members have an interest in the outcome of this case:

The *Community Bankers Association of New York State* is the principal trade association for savings institutions in New York. Its 129 members represent $126 billion in assets and include federal and state-chartered savings banks and savings and loan associations, and mutual and stock-owned savings and banking institutions.

The *Florida Bankers Association* (FBA) is the principal organization representing commercial banks in Florida. FBA's 321 members comprise 88% of the banks in the state, and these member banks hold 96% of the state's bank deposits.

The *Independent Bankers Association of America* (IBAA) is the only national trade association that exclusively represents the interests of the nation's community banks. The 5800 member institutions of IBAA serve a variety of communities—cities, suburbs, and rural areas —in all fifty states and the District of Columbia.

The *Independent Bankers Association of Texas* (IBAT) is a trade association representing approximately 800 independently owned or community banks domiciled in the State of Texas. The IBAT membership includes both national and state-chartered institutions.

The *Kentucky Bankers Association* is a trade association of 300 national and state banks representing over 95% of the banking industry in Kentucky.

The *Mississippi Bankers Association* (MBA) (formally known as the Mississippi Association of Financial Institutions of Deposit, Inc.) is a trade association representing commercial banks in Mississippi. MBA comprises 114 commercial banks, which hold over 99% of the state's commercial banking assets.

Savings & Community Bankers of America is the national trade organization for the savings industry. Its 1900 members include federal and state-chartered instituitons, stockholder or mutually-owned, throughout the United States.

The *Texas Bankers Association* (TBA) is the principal trade association for the commercial banking industry in Texas. TBA's members include over 900 federal and state-chartered banks within the state. The members include banks of all sizes located throughout Texas, including independent banks as well as members of multistate holding companies. TBA members account for approximately 95% of the deposits in Texas' commercial banking system.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Utah and Wyoming, as well as American Samoa and Guam. WIB's members account for more than $34 billion in banking assets.

SUMMARY OF THE ARGUMENT

At issue in this case is the ability of national banks to market annuities as selling agents of other, third-party issuers. Because banks act as intermediaries in the issuance of annuity contracts, such annuity sales by national banks pose no risk to the financial safety and soundness of the banks themselves. At the same time, bank annuity sales benefit the public, which understandably expects banks to offer a wide range of financial products and services. Sales of investment products, including mutual funds and annuities, provide banks with an important and growing source of revenue.

The Comptroller—who is charged with the responsibility to ensure the soundness of national banks—correctly determined that fixed and variable annuities are financial investment products that fall within the business of banking, and that the sale of such products by national banks accordingly is authorized under 12 U.S.C. § 24 Seventh. The court of appeals erred both in refusing to recognize the congressionally-designed flexibility of national banks to sell innovative financial products, and in failing to accord appropriate deference to the Comptroller's reasonable interpretation of the Act.

The Comptroller also properly determined that annuities are not "insurance" within the meaning of 12 U.S.C. § 92 and that Section 92 does not impliedly limit bank sales of annuities. Variable and fixed annuities are recognized by the great weight of authority to be investments, and thus are appropriate elements of the business of banking regardless of whether certain types of annuities bear some "insurance" or risk-shifting characteristics. The court of appeals improperly failed to accord any deference to the Comptroller's determination that annuities are not "insurance" within the meaning of Section 92.

The court of appeals also erred in reading Section 92 as an implied limitation on the authority of national banks to sell annuities as a financial product within the

parameters of the business of banking. Section 92 does not by its terms limit bank sales of annuities or insurance, nor does the affirmative authorization in Section 92 for banks located in small towns to act as general *insurance* agents in the sale of a wide range of insurance policies negate other banks' ability to market specific types of *investment* products such as the annuities at issue in this case. Congress did not attempt in Section 92 to define fully the powers of national banks to engage in the sale of all types of insurance-related products.

ARGUMENT

Section 24 Seventh was reasonably interpreted by the Comptroller to authorize NationsBank to sell annuities because that activity is within banks' power to broker financial investment instruments. App. 37a-41a.[2] Section 24 Seventh does not enumerate the specific types of financial products and services that national banks may market. Instead the statute provides substantial flexibility to allow for the development of financial products to meet the changing needs and expectations of consumers. Moreover, Section 92 was reasonably found by the Comptroller not to limit the authority of national banks to market specific types of investment products such as annuities, regardless of whether such products are deemed to be "insurance" for purposes of that law.

I. SECTION 24 SEVENTH AUTHORIZES NATIONAL BANKS TO SELL ANNUITIES AS PART OF AND INCIDENTAL TO THE BUSINESS OF BANKING.

Banks have played a historic role in our national commerce as financial intermediaries. In furtherance of this role, banks have long offered annuity contracts as part of

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[2] The Comptroller also noted that to the extent the annuity contracts at issue in this case might be considered "securities" under the Glass-Steagall Act, they would fall within national banks' express securities brokerage authority, which appears elsewhere in Section 24 Seventh. App. 37a.

the diverse menu of financial investments made available to bank customers.

The Comptroller's ruling allowing the sale of both fixed and variable annuities by national banks is pro-competitive. In particular, consumers find in banks a convenient and ready provider of these types of financial products. As the Comptroller noted in his opinion: "Customers will benefit from the increased range of products made available to them by [petitioner NationsBank]." App. 48a. Bank customers are the primary beneficiaries of bank annuity sales because the distribution of annuities by and through banks provides a convenient and competitive means for consumers to purchase such investment products. Indeed, between 75% and 90% of those purchasing annuities from banks in 1993 were first-time buyers of these products. Association of Banks-In-Insurance, *Fact Book* 7 (1993). Annuity issuers also benefit from banks' ability to serve as a popular "retail" outlet for their annuity products. The court of appeals' attempted revocation of banks' ability to sell annuities would leave consumers with little choice but to purchase annuities through fewer and less conveniently available sources, such as insurance agents and other non-bank distributors like respondent VALIC. In short, by foreclosing bank annuity sales and thus constricting the consumer's opportunity to purchase annuities, the decision below would make the public the victim of its error.

Banks' ability to market annuities and similar investment products also benefits the banking system. Fees generated by bank brokerage of annuities represent an increasingly important source of revenue for banks. Banks' financial positions are strengthened by these fees. Recent statistics provided by Kenneth Kehrer and Associates demonstrate that financial institutions more than tripled their annual annuity sales between 1987 and 1993. By 1993 annual annuity sales by financial institutions in the United States totalled *$13.5 billion*. In 1993 banks and thrifts accounted for 21.3% of individual annuity sales.

At the same time, the sale of annuities by banks poses no risk to the financial security of banks, for at issue here is solely their ability to act as agents for non-bank issuers of the annuity contracts. For the same reason, such bank sales of annuities pose no risk to the federal deposit insurance funds.

A. The Sale of Annuities Is Part of and Incidental to the Business of Banking.

Under the Act, Congress empowered national banks to engage in the business of banking. In Section 24 Congress set forth the basic elements of national bank powers. Congress did not in that Section or elsewhere exhaustively delineate the parameters of banking functions, nor does the Act enumerate all the financial products and services that national banks may offer their customers. Rather, Congress in Section 24 Seventh imbued national banks with "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh.

Consistent with their charter to carry out the business of banking and pursuant to the "incidental powers" clause of Section 24 Seventh, national banks traditionally have provided a wide and increasingly diverse range of financial products and services to the public. Annuities are within the scope of the types of financial services that national banks have long provided to their customers. Annuities, like such other familiar investment products as certificates of deposit and mutul funds, offer consumers a convenient way to obtain a return on their assets and to augment their savings. The tax-deferred feature of annuities, similar to individual retirement accounts (IRAs), makes annuities particularly appealing as investments for retirement. The Comptroller recognized this function of annuities: "Most commonly, annuities are marketed as a tax-sheltered means of saving for retirement." App. 38a. Annuities are widely recognized as essentially investment products, and the Comptroller's reasoned determination

that annuities are financial investment products, within the power of national banks to market is reasonably founded both in the law and the perceptions of the marketplace. *E.g., New York State Ass'n of Life Underwriters v. New York State Banking Dep't*, 598 N.Y.S.2d 824, 828 (App. Div. 1993) (upholding power of New York-chartered banks to market annuities: "[T]he great weight of authority in this country views an annuity as an investment and not a contract of insurance."), *aff'd*, 83 N.Y.2d 353 (1994) (*"Life Underwriters"*). "Annuity contracts must . . . be recognized as investments, rather than insurance." 1 John A. Appleman, *Insurance Law and Practice* § 84, at 295 & n.3 (1981) (collecting cases).[3]

While Section 24 Seventh does not expressly mention "annuities"—just as it does not mention IRAs or, for example, certificates of deposit—the investment characteristics of annuities make them financial investment products that fit comfortably within the contemporary business of banking. "[T]he National Bank Act did not freeze the practices of national banks in their nineteenth century forms." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). Rather, "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *Id.* Indeed, as this Court has instructed in interpreting the statutory powers of national banks, "[w]e do not think the . . . Act should be construed to freeze individual banks . . . to the customs and practices preceding the statute." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377 (1954) (holding that national banks may use the term "savings" in advertising the availability of deposit accounts).[4]

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[3] *See also* Ellen E. Schultz, *Variable Annuities Provide the Choices of Mutual Funds, Plus Some Tax Breaks*, Wall St. J., Oct. 14, 1993, at C1 (describing variable annuities as investment contracts).

[4] The provision at issue in that case—enacted as part of the Federal Reserve Act and previously codified at 12 U.S.C. § 371

Judicial interpretations of Section 24 Seventh's specific state law predecessor reinforce the intent of the federal incidental powers clause to provide for the full participation of banks in the evolving business of banking. Section 18 of the New York Free Banking Act of 1838 (now codified in relevant part at N.Y. Banking Law § 96(1) (McKinney 1993)) ("Section 96(1)"), which contains language identical to that of Section 24 Seventh, is acknowledged to be the progenitor of the incidental powers clause of Section 24 Seventh. Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 698-99 (1983).[5] The principal drafter of the legislation that would become the Act, Representative Elbridge G. Spaulding, was a New York lawyer and banker. John J. Knox, *A History of Banking in the United States* 221, 294 (1901). He was undoubtedly well aware of the purpose of New York's incidental powers clause when he included identical language in the federal statute. Indeed, in his remarks to the House of Representatives, Representative Spaulding stated that "the [federal] bill in all its essential features is like the free banking law of the State of New York." Symons, *supra*, at 699. Hence, Section 96(1) is instructive as to the meaning of—and the congressional intent underlying—the federal provision.[6]

New York courts, in holding that the sale of annuities by banks is permissible under Section 96(1), have recognized that "the 'incidental powers' clause has as its purpose events in futuro." *Life Underwriters*, 598 N.Y.S.2d at 827, 829 (App. Div. 1993), *aff'd*, 83 N.Y.2d 353 (1994). The New York Court of Appeals affirmed the

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(1952)—dealt with the authority of national banks to accept and pay interest on time and savings deposits. 347 U.S. at 375-76.

[5] *See* Bray Hammond, *Banks and Politics in America From the Revolution to the Civil War* 727 (1957); John J. Knox, *A History of Banking in the United States* 221-22 (1901).

[6] *See* 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* §§ 51.01, 51.06 (5th ed. 1992) (state and federal statutes *in pari materia* are to be construed together).

appellate division's decision in *Life Underwriters* earlier this year and emphasized that "the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service." 83 N.Y.2d at 361.

This interpretation of New York's incidental powers clause is of long standing. The decisions in *Life Underwriters* were based on *Curtis v. Leavitt*, 15 N.Y. 9 (1857), handed down seven years before Congress enacted the National Bank Act. In *Curtis*, the New York Court of Appeals held that banks may borrow money—though not expressly empowered to do so by statute—as a power incidental to the business of banking. *Id.* at 54-59.

In *Dyer v. Broadway Central Bank*, 252 N.Y. 430 (1930), the New York Court of Appeals reaffirmed the essential flexibility of the state's incidental powers clause. The court there recognized that "[b]anks *ex necessitate* have been required to extend their functions and perform services formerly foreign to the banking business." *Id.* at 433. Indeed, the court in *Dyer* cautioned that "care should be exercised not to cripple [banks] and break down their usefulness by a narrow and unreasonable construction of the [banking] statutes which will result in unwisely limiting their usefulness in the transaction of business under modern conditions." *Id.* at 434.

Like its New York counterpart, the incidental powers provision of Section 24 Seventh does not "freeze" the business of banking in time. *M & M Leasing Corp.*, 563 F.2d at 1382. Rather the incidental powers clause should, like its New York predecessor, "be construed as an independent, express grant of power, intended to reflect the ever-changing demands of the banking business." *Life Underwriters*, 83 N.Y.2d at 363. The proper inquiry under Section 24 Seventh is not whether the sale of annuities was incidental to the business of banking 130 or even 80 years ago, but whether the sale of such products is incidental to the banking business today.

The court of appeals, however, overturned the reasoned conclusion of the Comptroller that national bank sales of annuities are part of the business of banking and are authorized by the Act. The holding of the court of appeals fundamentally misconstrues the well-established function of the incidental powers clause and unduly constrains the flexible statutory scheme crafted by Congress to govern national banks. The court of appeals wrongly looked to the embryonic business of banking as it then existed in 1864 (when the Act was enacted) and in 1916 (when Section 92 was added to the Act) to determine whether the sale of annuities is incident to that business today. App. 17a. This retrospective analysis ignores the purpose of Section 24 Seventh—to allow the business of banking to evolve to meet changing market and consumer demands.[7]

Rather than address the well-established purpose of the incidental powers clause or its import to national bank sales of annuities, the court of appeals stated summarily that "[e]ven conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed '*necessary*.'" App. 15a (emphasis added). Thus, in addition to ignoring the flexibility of the incidental powers clause, the court of appeals also erroneously relied upon an overly restrictive and judicially discredited test in reviewing the bank's activities. Federal courts consistently have rejected this restrictive construction of the incidental powers clause for at least two decades.[8] Instead, the

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[7] The court of appeals repeated the error it had made in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968). There the court of appeals similarly looked to the business of banking as it existed in 1916 to determine whether a national bank could operate an insurance agency under the incidental powers clause of Section 24 Seventh.

[8] As noted above, the New York state courts have rejected this crabbed interpretation of the incidental powers clause for over a century: "It is plain that [banking] corporations, in executing their express powers, are not confined to means of such indispensa-

courts generally construe an activity to be a permissible form of the business of banking under Section 24 Seventh if the activity is "*convenient or useful* in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972) (emphasis added); *accord M & M Leasing Corp.*, 563 F.2d at 1382; *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 778 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). *Cf. American Ins. Ass'n v Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (finding even the "convenient and useful" test of *Arnold Tours* to be unduly restrictive).

B. The Court of Appeals Should Have Deferred to the Comptroller's Expert Determination on National Bank Authority to Sell Annuities.

The Comptroller's determination that national banks are authorized to sell annuities is consistent with his responsibility to administer the Act so as to ensure the safety and soundness of banks. Congress created the Office of the Comptroller of the Currency to oversee national banks and administer the national banking laws. For over a century the Comptroller has been expert in this complex area of law, regulation, and business:

> [C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

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ble necessity that without them there could be no execution at all." *Curtis*, 15 N.Y. at 64-65.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) ("*Clarke v. SIA*") (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971)); *see also* 12 U.S.C. §§ 26 (1988) (Comptroller's chartering authority), 211(a) (1988 & Supp. V 1993) (rulemaking authority), 1818 (1988 & Supp. V 1993) (enforcement authority). The financial services industry is complex, ever-changing, and heavily regulated. *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). This regulatory and competitive environment is particularly suited to the expert judgment of the regulators that deal with the industry on a day-to-day basis.

While Congress allowed for the activities of national banks to evolve over time, that evolution was made subject to the supervision of the Comptroller. Congress empowered the Comptroller to ensure the orderly development of the national banking system consistent with safe and sound banking standards. It is this regulatory authority that has allowed the business of banking to evolve and meet the challenges of the ever-changing financial services market, though the structure of the Act has remained essentially unchanged for well over a century.

Whether the sale of annuities is an "incidental power" under Section 24 Seventh is in the first instance for the Comptroller to determine. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *Clarke v. SIA*, 479 U.S. at 403-04; *Investment Co. Inst. v. Conover*, 790 F.2d 925, 931-32 (D.C. Cir.) (upholding decision of Comptroller authorizing national bank to establish and market a collective investment trust for assets of IRAs), *cert. denied*, 479 U.S. 939 (1986). His determination should control so long as it represents a reasonable construction of the Act. Ignoring this fundamental principle of administrative law, the panel instead rendered its own interpretation, compounding its error by looking backward in time instead of forward. By substituting its own construction of the stat-

ute for that of the Comptroller, the court of appeals ignored the regulatory scheme established by Congress, in derogation of the instructions of this Court in *Chevron* and *Clarke v. SIA*, and improperly constructed anticompetitive barriers that prevent banks from participating fully in the rapidly changing financial services marketplace.

II. SECTION 92 DOES NOT IMPLIEDLY LIMIT NATIONAL BANKS' AUTHORITY TO MARKET ANNUITIES.

The court of appeals did not—and could not—rely upon any express statutory restriction on bank sales of annuities because none is to be found. Instead the court of appeals engaged in an indirect, two-step inquiry: The panel first determined that Section 92 impliedly precludes banks located outside small towns from selling insurance because Section 92 affirmatively authorizes banks in small towns to act as insurance agents. The court of appeals then found that annuities are insurance. This analysis begged the fundamental question in this case—whether the federal banking laws, particularly Section 92, evidence a congressional intent to preclude national bank sales of annuities.

When he examined the issue, the Comptroller correctly found that Section 92 does not expressly or impliedly limit the authority of national banks to market annuities and that in any event, annuities are not insurance within the meaning of Section 92. The Comptroller's reasoned determination should be upheld, and the contrary ruling of the court of appeals should be reversed.

A. Section 92 Has No Bearing on National Bank Annuity Sales Because Annuities Are Not "Insurance" Within the Meaning of That Section.

Section 92 addresses only the solicitation and sale of *insurance* policies, and therefore sheds no light on whether national banks may market *annuities*. Both as

a matter of congressional intent and from a contemporary perspective, the full range of annuities at issue in this case are not "insurance" within the meaning of Section 92. Accordingly, Section 92 is not pertinent to the case at hand.

As an initial matter, the court of appeals erroneously relied on its prior decision interpreting Section 92, *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968). *Saxon* was an "insurance" case that entailed no question as to the status of the product under the Act. There, the bank had received approval to sell "broad forms of automobile, home, casualty and liability insurance" as agent for insurance companies. *Id.* at 1012. The *Saxon* court read Section 92 impliedly to limit the scope of national bank authority, invoking the interpretive maxim, *expressio unius est exclusio alterius. See* App. 6a. Considering that "Congress dealt specifically with the insurance agency power in Section 92," the *Saxon* court found that "the *expressio unius* rule negates the existence of any other power to act as an insurance agent under the general provisions of Section 24(7)." 399 F.2d at 1014. Here, what is at issue is the sale of annuities issued by third parties by national banks, and the decision in *Saxon* regarding broad insurance powers is inapposite. Other courts have similarly distinguished *Saxon* in cases involving particular bank products or services. *See Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979) (authorizing national bank sales of credit life insurance, and distinguishing *Saxon* as involving "banks' authority to sell broad forms of automobile, home, casualty and liability insurance"), *cert. denied*, 449 U.S. 823 (1980).

Because this case involves only the sale of annuities, the *expressio unius* rationale embraced by *Saxon* has no utility here: it is a non sequitur to argue that Section 92's enabling provisions as to "insurance agency powers," 399 F.2d at 1014, foreclose national banks from selling annuities. The conclusions the *Saxon* court gleaned from

Section 92 about national banks' insurance agency power to sell "insurance . . . policies," 12 U.S.C. § 92, shed no light on such banks' incidental power to market annuities and other subsequently developed products about which Section 92 is necessarily silent. In short, even were the *Saxon* exegesis sound, Congress' decision in 1916 to grant power to banks located in small communities to "solicit[] and sell[] insurance . . . policies," 12 U.S.C. § 92, evinces no intent to circumscribe national banks' authority to market other products, whether they be annuities, IRAs, money market funds, or yet-to-emerge investment arrangements.

Neither the text nor the purpose of Section 92 supports the court of appeals' conclusion that Congress intended by Section 92 to limit annuity sales by national banks on a geographic basis. As to text, a plain reading of the provision gives rise to a fair inference that Congress did not intend to address annuity sales at all, since Congress did not use the word "annuities." Equally as plausible as the court of appeals' conclusion that Section 92 impliedly restricts national bank sales of annuities, then, is the conclusion that Congress did not speak to annuities at all in that provision.

Nor does Section 92 exhibit any public policy basis on which Congress would restrict national bank sales of annuities. By blindly applying the *expressio unius* rule, the court of appeals could draw only one conclusion as to Section 92's purpose: that by granting to national banks in small towns the authority to act as general insurance agents Congress intended to preclude banks in other locals from doing so. But the court retreated from any attempt to explain why Congress would have intended this conclusion.[9] Further, the court offered no ex-

[9] Searching for a rationale to support its conclusion, the court cited only the sparse legislative history of Section 92—a letter by then-Comptroller Williams to the Chairman of the Senate Banking and Currency Committee. App. 7a-8a. In the Comptroller's view,

planation why Congress, even if its intent in Section 92 were to limit national banks from acting as insurance agents in the sale of broad forms of insurance, would have also intended to restrict national bank sales of annuities. In short, the court of appeals went far beyond the text and design of the statute when it purported to divine in Section 92 a congressional intent to foreclose national banks from selling annuities. Congress simply did not speak to that issue in Section 92.

The court of appeals cited no evidence that when Congress enacted Section 92 in 1916 it deemed the annuities at issue in this case to be a type of "insurance . . . polic[y]."[10] Particularly with respect to variable annuities, Section 92's references to "insurance compan[ies]" and "insurance . . . policies" cannot be read to encompass the financial products at issue in this case. Variable annuities were not originally the domain of insurance companies, having first been introduced in the early 1950s by a non-insurance organization, the College Retirement Equities Fund. Not until the late 1950s did insurance companies begin to imitate this product in an effort to counter the declining popularity of traditional insurance

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Section 92 was desirable because, in small towns, the amount of insurance policies written would not be sufficient to "take up the entire time of an insurance broker." App. 8a. Public policy *supported* bank sales of insurance, then, to fill a void (servicing customers in small towns) that insurance agents might not fill.

The Comptroller's only rationale for distinguishing between banks located in small towns and those located elsewhere is that because small towns might not be serviced by independent insurance agents, banks there would "not [be] likely to transgress upon outside business naturally belonging to others." *Id.* The court of appeals embraced this anticompetitive rationale without hesitation. Such an anticompetitive intent, however, should not so readily be attributed to Congress. *Cf. Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993) ("[W]e cannot assume that Mr. Williams' letter was read, much less relied upon, by the majorities in Congress who enacted section 92.").

[10] The federal banking laws do not define "insurance." As of 1916 the term "annuity" did not appear in the federal banking laws.

products. Note, *Redefining Insurance: Distinguishing Between Life Insurance and Investment Under Volatile Inflation*, 91 Yale L.J. 1659, 1664-65 (1982) (citing Joseph W. Bartlett, *Variable Annuities: Evolution and Analysis*, 19 Stan. L. Rev. 150, 150-52 (1966)); *see SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 & n.9 (1959) ("*SEC v. VALIC*"). Indeed, a wide range of annuity products exists today, some not involving mortality risks or actuarial calculations. *See* App. 27a (Smith, J., dissenting from denial of rehearing en banc). The court of appeals' conclusion that Section 92 prohibits national banks from marketing any annuities is not supported by the text or purpose of that provision.

By authorizing banks in small towns to sell "insurance" policies, Section 92 does not forbid banks elsewhere from selling annuities because annuities are not "insurance." "Ordinarily, it is recognized, even by laymen, that contracts of life insurance and of annuity are distinctly different." 1 John A. Appleman, *Insurance Law and Practice* § 84, at 295 (1981); *see* App. 24a-25a (Smith, J., dissenting from denial of rehearing en banc) (citing authorities).[11] This Court has squarely so held. *SEC v. VALIC*, 359 U.S. at 65. There VALIC, the respondent in this case, argued that a variable annuity product was an "insurance" contract and therefore was exempt from securities registration requirements. This Court disagreed, emphasizing that the "concept of 'insurance' involves some investment risk-taking on the part of the company." *Id.* at 71. Finding that variable annuities placed the investment risk on the policy holder, not the issuing com-

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[11] The court of appeals relied substantially on state laws that characterize annuities as insurance. App. 11a & n.2. In doing so, the court ignored its own ruling that recognized annuities are not always treated as contracts of insurance under state law. In *In re Newman*, 993 F.2d 90 (5th Cir. 1993), the court of appeals held that annuities are "general intangibles" under the Texas Uniform Commercial Code ("UCC"). Significantly, the UCC expressly excludes insurance contracts from the category of "general intangibles." *Id.* at 93-95.

pany, the Court ruled that variable annuities are not "insurance" exempt from the Securities Act of 1933 and Section 2(b) of the McCarran-Ferguson Act. *Id.* at 66-73. Concurring, Justice Brennan found that while the contracts contained "insurance features," they nonetheless to a substantial degree contained elements of investment contracts and thus did not constitute "insurance." *Id.* at 91.

This Court reaffirmed the vitality of *SEC v. VALIC* only last December. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). In analyzing whether the contract at issue in *John Hancock* was a "guaranteed benefit policy" exempt from certain aspects of the Employee Retirement Income Security Act, the Court looked to its "decisions construing the insurance policy exemption [of] the Securities Act of 1933." *Id.* at 527. In conducting this analysis the Court examined each component of the contract to determine whether that component allocated risk to the insurer.

While not directly addressed by the decisions in *SEC v. VALIC* or *John Hancock*, fixed annuities also are not appropriately deemed to be "insurance" for purposes of Section 92. As the Comptroller noted, fixed annuities "are primarily financial investments" because their purchasers "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a guaranteed, long-term return on their assets." App. 38a. Also, there is a "close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent." App. 39a.

SEC v. VALIC and *John Hancock* provide persuasive support for the Comptroller's determination that annuities are not "insurance" for purposes of Section 92, in that neither fixed nor variable annuities bear the underwriting risk hallmark of an insurance product. Beyond that, however, the proper focus for purposes of the federal

banking laws, and in reviewing the Comptroller's determinations, is whether the particular activity at issue (here the sale of annuities) bears a reasonable relationship to the business of banking, not whether the product happens to evidence some insurance characteristics. That a product may have some insurance or risk-shifting attributes does not disqualify it from the business of banking, for there is no evidence that in enacting Section 92 Congress drew any distinction between products that shift the risk of loss from the policy holder to the policy issuer and products that lack such a feature—a distinction this Court found important in interpreting federal securities laws.[12] At issue in this case is the authority of national banks to act as intermediary between the policy holder and policy issuer in the sale of a product with investment characteristics. The locus of the risk has little bearing on that issue; indeed, selling banks bear no such risk. Bank facilitation of annuity sales is consistent with banks' mission as financial services providers and with the sound business of banking.

The Comptroller found that annuities are not "insurance" within the meaning of Section 92. The court of appeals did not even discuss whether deference to that determination was warranted. Under the court of appeals' "no-deference" standard, the judiciary would bear the de novo responsibility for classifying each new financial in-

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[12] *Cf. SEC v. VALIC*, 359 U.S. at 80 (Brennan, J., concurring): "Much bewilderment could be engendered by this case if the issue were whether the contracts in question were 'really' insurance or 'really' securities—one or the other. It is rather meaningless to view the problem as one of pigeonholing these contracts in one category or the other."

For purposes of federal banking laws, a financial product that bears investment characteristics should be presumed to fall within the business of banking, even if the product also contains insurance characteristics. In this way, Section 92, even if read as a limitation on bank insurance powers, can be reconciled with Section 24 Seventh's authorization for national banks to carry out the business of banking.

novation as "insurance" or "investment." Congress has provided a judicially more economical and competitively better way—deferring to the expert judgment of the Comptroller as the primary interpreter of what constitutes the business of banking.[13]

The statutory scheme does not give unrestricted power to the banks. The Comptroller retains authority to limit any activity that deviates from the authorization the Comptroller has given NationsBank. While this case does not pose the question, the Comptroller can approve (or disapprove) and thereafter regulate national banks sales of financial products and services, including insurance, that are determined by him to be incidental to the business of banking. The Comptroller may deny a request by a national bank to engage in such activity, or may take enforcement action against an entity that does so. 12 U.S.C. § 1818 (1988 & Supp. V 1993). In short, the Comptroller retains pervasive authority to make particularized determinations to guard against compromise of the letter or design of the federal banking laws. *See Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46, 57 (1981) (finding deference to Board particularly appropriate where procedures ensured that Board would have "opportunity to ensure that no bank holding company exceeds the bounds of a bank's traditional fiduciary function of managing customers' accounts").

B. Section 92 Does Not Limit the Business of Banking.

The premise of the court of appeals below and in its prior decision in *Saxon* was that Section 92 poses a "spe-

[13] If it were Congress' intent that national banks not market annuities, Congress presumably would have said so by now. The Comptroller first expressly authorized national banks to market some forms of annuities a decade ago. *See, e.g.*, OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985). In the intervening years Congress has not enacted legislation depriving the Comptroller of the authority to permit national bank sales of annuities.

cific limitation," App. 3a; *see* App. 15a-16a, on the power of national banks in places with more than 5000 residents to sell insurance policies, and that this limitation supersedes any previous congressionally fashioned grant of general authority for national banks to engage in the business of banking under Section 24 Seventh. This premise and the court's conclusion that Congress in Section 92 fully defined the scope of national bank powers to market insurance-related products are incorrect.

As enacted in 1864, the Act did not limit the authority of national banks to engage in insurance activities. National Bank Act of 1864, c. 106, 13 Stat. 100; Ross M. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* app. at 195-214 (1968). Not until 1916, more than a half century later, did Congress enact Section 92—the provision the court of appeals found dispositive of this case. Act of Sept. 7, 1916, c. 461, 39 Stat. 753. Like the original Act, Section 92 did not limit bank powers to market insurance products. Instead, Section 92 expressly grants power "[i]n addition" to the other powers of national banks.

Congress' purpose in enacting Section 92 is made plain by the provision's text: banks in small towns are authorized to act as general insurance agents by soliciting and selling a wide range of insurance policies on behalf of any state-authorized "fire, life, or other insurance company":

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company . . . .

12 U.S.C. § 92. The court of appeals' conclusion—that Congress intended Section 92 to be the sole source of authority for and definition of all bank insurance powers —places on that provision far more significance than its words can bear. Whatever its rationale, Congress did not in Section 92 fully define the power of national banks to participate in insurance-related functions.

Beyond the fact that the explicit wording of Section 92 makes plain that Congress did not intend that provision to "occupy the field" of national bank marketing of insurance-related products, Section 92 also gives no indication that Congress impliedly attempted to restrict the general bank powers set out in Section 24 Seventh. In deciding this case, however, the court of appeals "largely follow[ed]" its prior decision in *Saxon*. App. 17a. There, the court found that Section 92 placed specific limits on banks powers, even those that may have been granted under the provisions of Section 24 Seventh. By attempting to impose a limiting intent on the powers of Section 24 Seventh, the court of appeals ignored this Court's oft-repeated admonition that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). The court of appeals erred in viewing the enabling legislation of 1916 as a provision intended forever to foreclose national banks from marketing any insurance-related financial investment products.

If Congress had intended to limit bank insurance activity, it knew how to say so. For example, Section 16 of the Glass-Steagall Act expressly amended Section 24 Seventh to limit banks' authority to deal in securities and stocks, and expressly stated that a national bank was not authorized to purchase stock for its own account. In 1971 this Court examined whether the Comptroller properly could authorize national banks to sell shares in a stock fund created and maintained by the bank. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 621 (1971). The Court noted

that "§§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks." *Id.* at 625. Indeed, "[t]he literal terms of that Act *clearly prevent[ed]* what the Comptroller ha[d] sought to authorize." *Id.* at 639 (emphasis added). But even while yielding to this clear statutory command, the Court emphasized that courts "cannot come lightly to the conclusion that the Comptroller has authorized activity that violates the banking laws." *Id.* at 626.[14]

Thus, when Congress wanted to draw a clear line defining and limiting bank functions, it knew how to do so. Just as it has defined the securities brokerage authority of national banks, Congress has authoritatively defined the trust powers of national banks. 12 U.S.C. § 92a (1988). As another example, a national bank may not deal in lottery tickets because Congress *expressly* has so stated. 12 U.S.C. § 25a(a) (1988). Section 92, in contrast, neither purports fully to define national banks' ability to market specific insurance-related products, nor expressly forbids national banks from doing so.

The Comptroller's view that Section 92 is an enabling provision and not a limiting one is further strengthened by the absence from the 1916 legislative record of evidence that national banks located outside small towns were engaged in insurance activity, that such activity was viewed as abusive, or that Section 92 was designed to stop such a practice. By contrast, Congress banned national bank dealing in lottery tickets in response to the fact that banks in New York were doing just that. S. Rep. No.

[14] The Court was unwilling to defer to the Comptroller in the *Camp* case because the Comptroller had not issued a written position on the impact of the banking laws in promulgating the regulation at issue. 401 U.S. at 627-28. Here, by contrast, the Comptroller made a reasoned determination that the banking laws permit the activity he has authorized. *See Board of Governors*, 450 U.S. at 68 (adhering to the obligation to afford deference to Comptroller who—in contrast to the situation in *Camp*—had provided his expert opinion on the issue at hand).

727, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2228, 2229, 2231.

The text of Section 92 tells us only that Congress thought that it should be statutorily explicit that banks located in small towns may act as general insurance agents. To read into Section 92 a negative (and anticompetitive) intent to define restrictively all national bank activities regarding insurance, let alone regarding all investment products that may have some attributes in common with insurance, is to ascribe to that provision far more than is warranted by the text. The court of appeals erred in interpreting Section 92 to be dispositive of all types of bank insurance-related sales activities.

Other courts of appeals have agreed: "There is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance." *Independent Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 736 F.2d 468, 477 n.6 (8th Cir. 1984). "By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 n.18 (D.C. Cir. 1979) (authorizing sale of credit life insurance), *cert. denied*, 449 U.S. 873 (1980). *Cf. Commissioner v. First Sec. Bank*, 405 U.S. 394, 403 n.16 (1972) ("The making of credit insurance available to customers was and is a common practice in the banking business"; noting but not ruling on *Saxon*'s reading of Section 92).

The proper approach to interpreting Section 92 is to accept that provision for what it says—not, as did the court of appeals, to draw expansive conclusions from what it leaves unsaid. Section 92 lacks the clear, express commands that would evidence congressional intent wholly to define this field. If Congress perceives abuses

in Comptroller-sanctioned activities by banks in the insurance or investment product fields, Congress easily can, as it has done elsewhere, limit the scope of that activity.[15] In this circumstance the judiciary should tread lightly, taking care to avoid leaping from a narrowly stated positive addition to general banking powers to a sweeping negation of all that is unstated, particularly where there exists *in pari materia* a provision such as the incidental powers clause. Absent "literal" legislative terms that "clearly prevent" particular bank activity, *ICI v. Camp*, 401 U.S. at 639, the court of appeals should not have overturned the studied determination of the Comptroller. The court of appeals misinterpreted Section 92, and its judgment should be reversed.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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[15] *See ICI v. Camp,* 401 U.S. at 644 (Blackmun, J., dissenting):

I am not convinced that the Congress, by [the Glass-Steagall] Act or otherwise, as yet has proscribed the banking endeavors under challenge here by competitors in a highly competitive field . . . . I would leave to Congress the privilege of now prohibiting such national bank activity if that is its intent and desire.

(11)

Nos. 93-1612 and 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.3 of this Court, The New York Clearing House Association (the "Clearing House") respectfully submits this brief with the consent of all parties.

INTEREST OF *AMICUS CURIAE*

The Clearing House is an unincorporated association of eleven leading commercial banks in the City of New York.[1] Four of the Clearing House member banks are national banking associations subject to the National Bank Act (the "NBA")[2] and, thus, to the supervision and regulation of petitioners the Comptroller of the Currency and the Office of the Comptroller of the Currency (together, the "OCC"). The Clearing House often appears as an *amicus curiae* in cases, such as this, raising important questions of banking law.

The Clearing House has a substantial interest in the questions presented here because of its member banks' involvement in the brokerage of annuities, an important and growing part of commercial banking. In 1993, commercial banks, including Clearing House member banks, sold an estimated $16 billion worth of annuities, *see* Karen Talley, *Bank Annuity Sales Seen Surging in '93*, THE AMERICAN BANKER, June 30, 1993, at 17, and such sales represented approximately seven percent of all bank brokerage activity. *See* Kurt Cerulli & David Nadig, *Variable Annuities Add a Steady Flow to Bank Brokerages' Revenue Streams*, THE AMERICAN BANKER, July 14, 1993, at 12.

In addition, relying on the authorizations and regulations of the OCC and other bank regulators, Clearing House

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

[2] Ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code).

member banks sell as agents other products related to the business of banking that, unlike annuities, are generally considered insurance. The sale of these products, which include credit life, credit disability, mortgage life, mortgage disability and involuntary unemployment insurance, provides millions of dollars in revenues to national banks each year.

More generally, the Fifth Circuit's crabbed construction of the "incidental powers" clause of Section 24 (Seventh) of the NBA calls into question the extent to which national banks may continue to respond, as they have for more than 100 years, to the rapidly evolving needs of their customers. The OCC has authorized national banks to engage in many activities, not specifically enumerated in the NBA, that are incidental to the "business of banking." If the NBA had to be amended every time national banks sought to offer new banking products or services, such banks could not compete successfully with other financial intermediaries, including savings banks, securities brokerage firms and mutual funds.

SUMMARY OF ARGUMENT

1. The Fifth Circuit flatly contravened the principle of judicial deference established by this Court in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"), in not deferring to the OCC's determination that the brokerage of annuities by national banks is authorized under Sections 24 (Seventh) and 92 of the NBA. Congress did not clearly bar national banks from brokering annuities in the NBA, and interpretation of the statutory term "business of banking" in Section 24 (Seventh) requires the OCC's special expertise.

Indeed, the respective determinations by the New York Court of Appeals in *New York State Association of Life Underwriters, Inc.* v. *New York State Banking Department*, 83 N.Y.2d 353, 363-64, 632 N.E.2d 876, 881-82, 610 N.Y.S.2d 470, 475-76 (1994) ("*NYSALU*"), and by the Fifth Circuit judges who dissented from the denial of rehearing *en*

banc (24a-27a),[3] that annuities are not a form of insurance—but financial investment instruments of the sort that banks have long sold—demonstrate powerfully that the OCC had far more than a reasonable basis—all that was necessary under *Chevron*—for authorizing national banks to broker annuities.

The Fifth Circuit's failure to defer to the OCC's reasonable interpretation of the NBA threatens regulatory predictability and stability in the commercial banking industry. If national banks could not rely on OCC regulations under, and interpretations of, the NBA, they would be deprived of the predictability necessary for the development of innovative banking practices.

2. The Fifth Circuit's *de novo* determination that national banks may not act as agents for the sale of annuities rests on the mistaken proposition that annuities are a "'general' type of insurance" and not a financial investment instrument. (14a). From that premise, the court reached two erroneous conclusions: (i) that the sale of annuities as agent *is not* included in the express grant of authority in Section 24 (Seventh) for national banks to engage in all aspects of the "business of banking," and (ii) that such business *is* the sale of a form of general insurance that Section 92 limits to banks in towns of 5,000 or fewer inhabitants. (13a-17a).

a. The great weight of authority firmly establishes that annuities are financial investment instruments, and it is settled that banks may act as agents for the sale of securities, certificates of deposits and other financial investment instruments to their customers. The court below ignored this authority and relied, instead, on a mistaken conception of annuities and an unfounded—and, indeed, unarticulated—

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[3] Citations in the form "__a" are to the appendix to the petition for a writ of certiorari in No. 93-1612.

construction of national banks' power to conduct the "business of banking."

Both the language of, and decisions interpreting, the incidental powers clause support the OCC's determination that national banks are expressly authorized to engage in all aspects of the "business of banking." The brokerage of annuities is clearly part of the business of banking, because such brokerage (i) involves the financial intermediation that is the essence of banking, and (ii) is akin to the brokerage of securities expressly permitted by Section 24 (Seventh). Moreover, by increasing the availability of annuities and by allowing national banks to compete on an equal footing with state-chartered banks and other financial intermediaries in the growing annuities market, the OCC's determination promotes sound banking policy.

b. Even if annuities are considered "insurance" for purposes of Section 92, the NBA should not be construed to bar national banks located outside of small towns from brokering annuities and credit-related insurance products that are incidental to the business of banking. The statutory language and legislative history support the OCC's interpretation that Section 92 is a supplemental grant of authority for national banks located in small towns and does not otherwise restrict the "business of banking."

ARGUMENT

I. THE FIFTH CIRCUIT DIRECTLY CONTRAVENED *CHEVRON* IN OVERRIDING THE OCC'S REASONABLE DETERMINATION THAT NATIONAL BANKS MAY BROKER ANNUITIES.

This Court has "long recognized that considerable weight should be accorded to an [agency's] construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. Such judicial deference is particularly appropriate where, as here, "[t]he subject under regulation is

technical and complex." *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984); *see also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-06 (1987) (applying *Chevron* to OCC's interpretation of federal banking laws).

1. Under *Chevron*, if "Congress has not directly addressed the precise question at issue, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 843-44. Thus, if a "statute is silent or ambiguous with respect to the specific issue, [administrative] regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44.

In reviewing the construction of a statute by the OCC or another agency, a "court need not conclude that the agency's construction was the only one it permissibly could have adopted, . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, the court must defer to the OCC's construction of the NBA as long as that interpretation is reasonable. *See Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-04.

As shown below, the Fifth Circuit violated these settled principles of judicial deference in overruling the OCC's reasonable construction of Sections 24 (Seventh) and 92 of the NBA to permit national banks to broker annuities. It plainly was within the OCC's province to determine that annuities are not "insurance" for purposes of Section 92, but rather are a form of financial investment instrument of the type that national banks have long sold pursuant to their power to engage in the "business of banking."

Nothing in the NBA or its legislative history indicates that Congress intended to prohibit national banks from brokering annuities. Sections 24 (Seventh) and 92 do not

refer to "annuities" or define the statutory terms "business of banking" or "insurance," and those provisions certainly do not manifest the "clear" intent required by *Chevron* for a court to override an administrative agency's determination. 467 U.S. at 842. On the contrary, the incidental powers clause of Section 24 (Seventh)—like the provision of the New York Banking Law upon which it is based—"does not consist of common words of clear import, and that clause is susceptible to differing interpretation." *NYSALU*, 83 N.Y.2d at 360, 632 N.E.2d at 879, 610 N.Y.S.2d at 473. In these circumstances, the Fifth Circuit erred in considering *de novo* matters that Congress had left to the special expertise of the OCC.

2. The Fifth Circuit's failure to follow *Chevron* threatens the OCC's expert administration of the NBA and the development of banking generally. Congress has specifically charged the OCC with the administration of the NBA, *see* 12 U.S.C. §§ 1, 21-216(a), and has left many parts of that regulatory scheme to the implementing regulations of the OCC and other bank regulators, which "maintain virtually a day-to-day surveillance of the American banking system." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963). Certain aspects of this scheme, especially those enacted many years ago, require interpretation and, frequently, reinterpretation to account for changing financial and technological developments, as well as consumer needs and preferences.

Since the enactment of the NBA in 1864, significant evolution has occurred in commercial banking and in the financial services industries in general. There have been both a proliferation of, and a growing homogenization in, products offered to consumers. For example, there is now relatively little difference for consumers among the wide range of money market and various other financial investment instruments offered by banks, brokerage firms and mutual funds. National banks must be able to rely on OCC

regulations and interpretations in order to respond to the changing requirements of the increasingly competitive marketplace for financial products and services.

The decision below, if allowed to stand, would pave the way for courts to substitute willy-nilly their construction of the NBA for the reasoned interpretations of the OCC, even where the regulators' interpretation is supported by the statute's language and legislative history. Such an approach inevitably would result in piecemeal and inconsistent application and development of the federal banking laws. It also would threaten the ability of national banks to meet their customers' demand for new financial products and services.

II. THE GREAT WEIGHT OF AUTHORITY SUPPORTS THE OCC'S CONCLUSION THAT ANNUITIES ARE FINANCIAL INVESTMENT INSTRUMENTS, NOT INSURANCE.

There is no sustainable basis for the Fifth Circuit's ruling, based on its impermissible *de novo* review of the OCC's decision, that "[a]nnuities are certainly no less a 'general' type of insurance than land title insurance or automobile insurance." (14a). This erroneous determination is the basis for the Fifth Circuit's equally misplaced holdings (i) that "annuities have nothing to do with the primary business of banking," and (ii) that Section 92 bars national banks from brokering annuities. (13a-14a).

Although insurance companies first developed and offered annuities, they have long been "recognized as investments rather than as insurance." 1 JOHN A. APPLEMAN, INSURANCE LAW & PRACTICE § 84, at 295 (1981); *see* DAVID SHAPIRO & THOMAS F. STREIFF, ANNUITIES 7 (1992) (annuities "are primarily investment products"). As the New York Court of Appeals has recognized unequivocally, the "great weight of authority supports the position that annuities

are not insurance." *NYSALU*, 83 N.Y.2d at 363, 632 N.E.2d at 881, 610 N.Y.S.2d at 475.[4]

"Annuit[ies] and insurance are opposites." *Helvering* v. *Le Gierse*, 312 U.S. 531, 541 (1941). Purchasers of insurance seek to protect against financial loss in the event of some adverse occurrence: death, disability, catastrophes such as floods or fires, or various other events causing injury or property damage. They seek protection (insurance), not investment income; indeed, if the insured-against loss does not occur, the insured does not receive any return on his or her premiums. *Compare* BLACK'S LAW DICTIONARY 90 (6th ed. 1990) (annuities) *with id.* 802 (insurance).

In contrast, purchasers of annuities, as is the case for purchasers of other bank investment products, seek a long-term return in the form of payments over time and not protection against some loss. In making investment decisions, consumers compare the investment risk and return of annuities with those of other investments available from banks and other financial intermediaries. "Any risk that the prepayment [premium] would earn less than the amount paid to [the annuitant] as an annuity [is] an investment risk similar to the risk assumed by a bank; it [is] not an insurance risk." *Helvering* v. *Le Gierse*, 312 U.S. at 542; *see also SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 207-08 (1967) ("In fixing the necessary premium [for an annuity] mortality experience is a subordinate factor and the planning problem

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[4] *See, e.g.*, *In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987) (quoting *In re Howerton*, 21 Bankr. 621, 623 (N.D. Tex. 1982)) ("an annuity is essentially a form of investment"); *Prudential Ins. Co. of Am.* v. *Howell*, 29 N.J. 116, 148 A.2d 145, 148 (1959) ("The risks assumed under life insurance policies and under annuity contracts are diametric opposites."); *Daniel* v. *Life Ins. Co.*, 102 S.W.2d 256, 260 (Tex. Civ. App. 1937) (an annuity "is essentially a form of investment, and uniformly held to be purely such").

is to decide what interest and expense rates may be expected. There is some shifting of risk from the policyholder to insurer, but no pooling of risks among policyholders. In other words, the insurer is acting in a role similar to that of a savings institution.").

The Fifth Circuit's "finding" that annuities are general "insurance" conflicts with this authority and cannot be reconciled with *SEC* v. *Variable Annuity Life Insurance Co. of America*, 359 U.S. 65, 71-73 (1959) ("*VALIC I*"), where this Court held that variable annuities are securities that must be registered with the Securities and Exchange Commission and are *not* "insurance" products exempt from such registration under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. As the Court emphasized, annuities do not involve "true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *VALIC I*, 359 U.S. at 73 (footnote omitted).

In interpreting the Employee Retirement Income Security Act, this Court recently reaffirmed its holding in *VALIC I* that a variable annuity "is not an 'insurance policy' . . . because the contract's entire *investment* risk remains with the policyholder." *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 527 (1993) (emphasis in original). *VALIC I* should similarly guide the Court in construing the NBA.

The Fifth Circuit broadly proscribed the brokerage by national banks of both variable and fixed annuities. (*See* 3a, 13a). Although referring to variable annuities, which comprise the bulk of annuities currently sold, the reasoning of *VALIC I* applies to fixed annuities as well. As the OCC determined, and the Fifth Circuit did not dispute, "[f]ixed annuities differ [from variable annuities] only in that [fixed annuities] offer a reduced level of risk, combining for the risk-averse investor the best aspects of both certificates of deposit and annuities." (39a-40a).

In addition, the Fifth Circuit erroneously focused solely on annuities for which the benefits are paid over the duration of the annuitant's life (a life income option). (*See* 12a, 27a). Most annuities pay benefits, however, for a specified period (a term certain option, *e.g.*, five, ten or fifteen years) or in a lump-sum distribution of the entire cash value of the annuity. *See* DAVID SHAPIRO & THOMAS F. STREIFF, *supra*, at 2-4 (describing types of annuities).[5]

The Fifth Circuit also leapt from the observation that "[a]ll fifty states currently regulate annuities under their insurance laws," to the erroneous conclusion that the brokerage of annuities is excluded from the business of banking. (11a, 13a). The brokerage of an investment is not removed from the business of banking merely because that investment is regulated by an agency other than the OCC, or is subject to laws other than the NBA.[6] If that were the case, then banks could not sell securities, which are regulated by the SEC under the federal securities laws, as well as by state regulators under state securities laws. In *VALIC I*, this Court rejected the notion that annuities must be deemed insurance for all purposes simply because the states regulate annuities

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[5] According to a study by the Society of Actuaries and Life Insurance Marketing Association, over the 12-year average life of an annuity, only 16.8 percent of annuity holders annuitize (*i.e.*, elect to receive payments for life); the overwhelming majority elects some other type of withdrawal such as full or partial repayment. *See Are Annuities Insurance or Investment Products?*, The Newsletter of the Bank-Insurance Industry, 1993-3, at 2-3 (published by Kenneth Kehrer Assocs., Princeton, N.J.).

[6] "'Banking' and 'insurance' are not mutually exclusive businesses; 'from a functional point of view there is a considerable overlap between the [two].'" *American Ins. Ass'n* v. *Clarke*, 656 F. Supp. 404, 409-10 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988) (quoting HENRY HARFIELD, BANK CREDIT AND ACCEPTANCES 184 (5th ed. 1974)) (brackets in original).

as insurance for certain purposes. The Court held that the "meaning" of "insurance or annuity" under federal statutes "is a federal question," and that "how states might have ruled is not decisive." 359 U.S. at 69.[7]

In addition, the Fifth Circuit ignored the OCC's reasonable conclusion that annuities resemble securities that banks are specifically authorized to sell to their customers. (*See* 37a-38a). Section 24 (Seventh) expressly provides that national banks may "purchas[e] and sell[] securities and stock without recourse, solely upon the order, and for the account of, customers," and, as is shown below, banks have historically sold securities to their customers.

The OCC also reasonably determined that annuities "functionally" resemble certificates of deposit that banks routinely offer to their customers. (40a-41a). The similarity between these two financial investment instruments is such that "the annuity is now the favorite alternative to the CD." DAVID SHAPIRO & THOMAS F. STREIFF, *supra*, at 8. Aside from their power to conduct the "business of banking," national banks may also sell these investment instruments because of the express authorization in Section 24 (Seventh) for such banks to "receiv[e] deposits."

In sum, the OCC had far more than the reasonable basis that is necessary under *Chevron* for its determination that, for purposes of the federal banking laws, annuities are financial investment instruments, not general insurance.

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[7] As is discussed below, however, because the "incidental powers" clause of Section 24 (Seventh) was taken virtually verbatim from early bank legislation in New York, interpretations of the corollary provision of New York law are persuasive—if not dispositive—here. *See*, *infra*, at 16-19.

III. Section 24 (Seventh) Authorizes National Banks To Engage In All Aspects Of The "Business Of Banking," Including The Brokerage Of Annuities And Other Financial Investment Instruments.

Having erroneously determined that annuities are a form of "general" insurance, the court below compounded its error under *Chevron* by disregarding the OCC's considered construction of the incidental powers clause of Section 24 (Seventh). Without providing any explication of the meaning of Section 24 (Seventh) or any delineation of the scope of the "business of banking," the court concluded that "conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed necessary." (15a). The court erroneously construed the word "necessary" to require that an activity be essential—or "intimately related to the bank's primary business of lending"—to be permissible under Section 24 (Seventh). (14a).

Whether an activity is "necessary" to the "business of banking" under Section 24 (Seventh) does not, as the Fifth Circuit held, depend upon whether that activity is characterized by some general label, such as "insurance" or "banking," or is otherwise essential to "lending."[8] Rather, as the OCC determined (38a (citing OCC Interpretive Letter No. 494, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,194-71,201 (Dec.

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[8] Lending is, of course, only one aspect of the business of banking. In any event, labeling is no substitute for analysis in construing the NBA. *See American Ins. Ass'n* v. *Clarke*, 656 F. Supp. at 408 ("there can be no serious quarrel with the [OCC's] assertion that it is entitled to look beyond the label given a certain activity to determine whether or not it is permissible").

20, 1989) ("Interpretive Letter No. 494")),[9] the inquiry must focus on whether the activity is consistent with the historic function of banks as financial intermediaries.

A. The Language and Legislative History of the NBA Support the OCC's Interpretation of the "Business of Banking."

1. By its terms, Section 24 (Seventh) authorizes national banks to engage in all aspects of the business of banking. While the statute identifies five specific powers that are granted to national banks, it also *expressly* authorizes those banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking."[10] It is a settled rule of construction that "a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990); *see* 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46.06, at

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[9] The OCC's determination that national banks may broker fixed annuities incorporated the reasoning of its earlier interpretive letter, which had permitted such banks to "broker a wide variety of financial investment instruments," such as agricultural, oil and metals futures. (*See* 38a).

[10] Section 24 (Seventh) provides that national banks may exercise "*all such incidental powers as shall be necessary to carry on the business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock . . . ." (Emphasis added)

119-20 (5th ed. 1992) ("A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . .") (footnotes omitted). In order to give full effect to all of the language of Section 24 (Seventh), it is necessary to construe the five enumerated powers as archetypes or examples of banking powers and not as the exclusive list.

If the Fifth Circuit's interpretation of Section 24 (Seventh) were correct, Congress would not have included the term "business of banking" in the NBA, because it would have been superfluous. Instead, Congress would have confined Section 24 (Seventh) to the enumerated powers and incidental powers necessary to carry out those enumerated powers. By expressly authorizing national banks to carry on the broadly-phrased "business of banking," rather than just the specifically-enumerated powers and activities incidental to those powers, Congress plainly expressed its intent to authorize banks to engage in the full panoply of activities that are necessary for banks to fulfill their function as financial intermediaries. This authorization includes those activities that would develop in response to inevitable changes in the financial world and the public's demand for banking services.

2. The OCC's interpretation of the incidental powers clause as not being confined to the specifically enumerated powers in Section 24 is consistent with the origins and history of the NBA, including the contemporaneous construction of the New York law upon which the NBA was patterned.

The NBA replaced the National Currency Act, which had been enacted a year earlier in 1863. Congress passed these measures to induce state-chartered banks to convert to federal charters in order to promote the development of a national currency and banking system. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA 724-27 (1957). During the first half of the nineteenth century, bank regulation was almost exclusively the province of the states. *See* Edward

Symons, *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 688-89 (1983).

Accordingly, Congress looked to state law—and particularly New York law—in formulating the powers of national banks. Congress adopted the "incidental powers" clause of Section 24 (Seventh) nearly verbatim from the New York Free Banking Act of 1838, *see Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 431 (1st Cir. 1972), and the legislative history indicates that Congress sought to confer upon national banks *all* of the powers then possessed by New York banks to carry on the business of banking.[11] "When a statute is [copied] from another, even a foreign, State, it generally is presumed to be adopted with the construction which it has received." *James* v. *Appel*, 192 U.S. 129, 135 (1904) (Holmes, J.); *see* 2B SUTHERLAND ON STATUTORY CONSTRUCTION § 52.02, at 198 (5th ed. 1992) ("courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated").

The incorporation of New York law included the judicial construction of that law prevailing at the time of the enactment of the NBA, most especially the decision in *Curtis* v. *Leavitt*, 15 N.Y. 9 (1857), which is considered the seminal decision on the meaning of the statutory term "business of

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[11] The Currency Act's principal draftsman, Representative Spaulding, explained that "[t]he bill in all its essential features is like the free banking law of the State of New York, which has been in successful operation in that State since 1838," and that it is intended "to nationalize the banking system of New York." CONG. GLOBE, 37th Cong., 3d Sess. 1114, 1141 (1863). Similarly, Representative Baker stated: "I would like to see all the States of the Union adopt the free banking system of the State of New York in its present completeness and perfection." *Id.* at 1142.

banking" under New York and federal law.[12] This Court, and lower federal courts, have thus relied on *Curtis* in construing the NBA.[13] The OCC similarly relied on *Curtis*, which the court below ignored in its decision, in determining that national banks may broker annuities. (*See* Interpretive Letter No. 494 at 71,196).

In *Curtis*, the New York Court of Appeals held that the incidental powers clause of the New York Free Banking Act did not limit the power of banks to the specifically enumerated powers, but, instead, authorized the inclusion of other banking activities as they developed over time. *See* 15 N.Y. at 58 (Comstock, J.) ("Those specifications were evidently intended not to restrict the appropriate business of banking, but as a mere legislative definition of that business."). As Judge Brown explained in a concurring opinion:

> The implied powers [of a bank] exist by virtue of the grant [to do the business of banking], and are not enumerated and defined; because no human sagacity can foresee what implied powers may, in the progress of time, the discovery and perfection of better methods of business, and the ever-varying attitude of human relations, be required to give

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[12] *See, e.g.*, Edward Symons, *supra*, at 694-98; Ralph F. Huck, *What Is the Banking Business?*, 21 BUS. LAW. 537, 540-42 (1966); Phillip R. Trimble, *The Implied Power of National Banks to Issue Letters of Credit and Accept Bills*, 58 YALE L.J. 713, 718 (1949); Henry Harfield, *The National Bank Act and Foreign Trade Practices*, 61 HARV. L. REV. 782, 798-99 (1948).

[13] *See, e.g.*, *Auten* v. *United States Nat'l Bank*, 174 U.S. 125, 143 (1899); *Arnold Tours, Inc.* v. *Camp*, 472 F.2d at 431; *Sneeden* v. *City of Marion*, 64 F.2d 721, 724 (7th Cir. 1933); *Kirkman* v. *Farmers' Sav. Bank*, 28 F.2d 857, 861 (8th Cir. 1928).

> effect to the express powers. They are, therefore, left to implication.

Id. at 157.[14]

The New York Court of Appeals later reaffirmed the need to construe the state's banking law to meet the changing demands of the business of banking. In *Dyer* v. *Broadway Central Park*, 252 N.Y. 430, 169 N.E. 635 (1930), for example, the court rejected the argument that all contracts by banks to purchase securities on behalf of their customers were *ultra vires*, stating: "Banks *ex necessitate* have been required to extend their functions and perform services formerly foreign to the banking business. Courts have taken cognizance of that fact in passing upon cases involving questions of banking law." *Id*. at 433, 169 N.E. at 636. The court cautioned that "care should be exercised not to cripple [banks] and break down their usefulness by a narrow and unreasonable construction of the statutes which will result in unwisely limiting their usefulness in the transaction of business under modern conditions." *Id*. at 434, 169 N.E. at 636.

Relying on *Curtis* and its progeny, the New York Court of Appeals recently confirmed that the incidental powers clause of the New York Banking Law empowers state-

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[14] *Curtis* squarely rejected the even more extreme notion, which the Fifth Circuit adopted (15a), that the inclusion in the incidental powers clause of the term "necessary" limits banks to the exercise of only those incidental powers that are *essential* to the exercise of specifically enumerated powers: "But necessity is a word of flexible meaning. There may be an absolute necessity, a great necessity, and a small necessity; and between these degrees there may be many others depending on the ever varying exigencies of human affairs." *Curtis*, 15 N.Y. at 64 (Comstock, J.); *see also McCulloch* v. *Maryland*, 17 U.S. (4 Wheaton) 316, 413-15 (1819) (the term "necessary" "frequently imports no more than that one thing is convenient, or useful, or essential to another").

chartered banks to adapt their product lines to meet changing economic conditions and the evolving demands of commercial banking customers: "the clause must be construed as an independent, express grant of power, intended to reflect the ever-changing demands of the banking business." *See NYSALU*, 83 N.Y.2d at 363, 632 N.E.2d at 881, 610 N.Y.S.2d at 475. Based on this conclusion and principles of judicial deference similar to those articulated in *Chevron*, the Court of Appeals held that it was not unreasonable for the New York Banking Department to have determined that New York-chartered banks may broker annuities because annuities are financial investment instruments of the type that banks have historically been permitted to sell. *Id.* at 364, 632 N.E.2d at 882, 610 N.Y.S.2d at 476.

The approach in *NYSALU* rests on the same principles that Congress incorporated into the NBA and, thus, is far more in keeping with Congress's intent in enacting Section 24 (Seventh) than is the Fifth Circuit's restrictive interpretation of the incidental powers clause.

B. This Court's Decisions Support the OCC's Construction of the "Business of Banking."

This Court has consistently given full effect to the language of the incidental powers clause of Section 24 (Seventh) and has authorized national banks to exercise powers that are not limited to those that are essential to the performance of one of the enumerated powers.[15] For

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[15] *See, e.g.*, *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 377 (1954) ("business of banking" includes power to advertise bank services); *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41, 48-50 (1940) (conduct safe-deposit business); *First Nat'l Bank* v. *City of Hartford*, 273 U.S. 548, 559-60 (1927) (sell and deal in mortgages and other evidences of debt); *Clement Nat'l Bank* v. *Vermont*, 231 U.S. 120, 140 (1913) (pay taxes on behalf of depositors); *Miller* v.
(continued...)

example, in *First National Bank* v. *National Exchange Bank*, 92 U.S. 122 (1875), one of its earliest decisions interpreting Section 24 (Seventh), this Court rejected the notion that the "incidental" powers of national banks are limited to those that are necessary to the performance of the specifically enumerated powers: "These powers are such as are required to meet *all the legitimate demands of the authorized business*, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others." *Id.* at 127 (emphasis added). *See also Miller* v. *King*, 223 U.S. 505, 511 (1912) (collecting judgment on behalf of depositor is not "so disconnected with the banking business as to make it in violation of" Section 24 (Seventh)); *Logan County Nat'l Bank* v. *Townsend*, 139 U.S. 67, 73 (1891) (national bank possesses "such incidental powers as are necessary to carry on the business of banking for which it was established").

Moreover, this Court's decisions confirm that the incidental powers clause authorizes national banks, consistent with their function as financial intermediaries, to engage in those activities that have "grown out of the business needs of the country." *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wallace) 604, 648 (1871) (power to certify checks); *see also Colorado National Bank*, 310 U.S. 41, 49-50 (1940) ("national banks do and for many years have carried on a safe-deposit business," and "such a generally adopted method

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[15](...continued)
King, 223 U.S. 505, 511 (1912) (collect judgment on behalf of depositor); *Wyman* v. *Wallace*, 201 U.S. 230, 243 (1906) (borrow money). Although the OCC expressly relied upon these decisions in permitting national banks to broker financial investment instruments, *see* Interpretive Letter No. 494 at 71,196-71,197, the court below did not mention, much less reconcile, this authority.

of safeguarding valuables must be considered a banking function authorized by Congress"); *Clement Nat'l Bank* v. *Vermont*, 231 U.S. 120, 140 (1913) (paying taxes on behalf of depositors "promote[s] the convenience of [the bank's] business").

The Court's most recent decision construing the incidental powers clause, *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), makes clear that Congress has authorized national banks to fulfill their role as financial intermediaries by meeting the "modern" requirements of the business of banking. In holding that national banks could advertise their services, the Court eschewed the static interpretation of "necessary" adopted by the Fifth Circuit below, instead requiring only that the activity be "usual and useful" to modern banking:

> *Modern competition for business finds advertising one of the most usual and useful of weapons.* We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business.

Id. at 377 (emphasis added).

The Fifth Circuit's construction of the incidental powers clause of Section 24 (Seventh) also conflicts with that of the other courts of appeals. *See First Nat'l Bank* v. *Taylor*, 907 F.2d 775, 778 (8th Cir.) (collecting cases holding that "the 'incidental powers' of national banks are not limited to activities that are deemed essential to the exercise of express powers"), *cert. denied*, 498 U.S. 972 (1990). The Ninth Circuit, for example, has emphasized that the NBA "did not freeze the practices of national banks in their nineteenth century forms," and that the incidental powers clause "permit[s] the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert.*

denied, 436 U.S. 956 (1978). The Fifth Circuit below completely ignored this authority.

This Court should now reaffirm that the incidental powers clause constitutes, as the OCC determined, an *express* grant of authority to national banks—separate and apart from the five other express powers—to engage in such activities as are necessary "to meet all the legitimate demands" of the "business of banking" as that business evolves to serve the changing needs of our dynamic economy and society. Even if the Court discerns any ambiguity on this point, and it should not, *Chevron* requires that the OCC's entirely reasonable construction of the clause to that effect be sustained.

C. The Brokerage of Financial Investment Instruments, Including Annuities, Is Part of the "Business of Banking."

In authorizing national banks to broker annuities, the OCC relied on its prior determination that such banks "may broker a wide variety of financial investment instruments." (*See* 38a). That decision, in turn, was based on (i) the settled power of banks, as part of the "business of banking," to broker "a wide variety of financial, investment, and monetary instruments and other financial commodities," and (ii) the express provisions in Section 24 (Seventh) permitting banks to broker securities and to extend credit. *See* Interpretive Letter No. 494 at 71,199-71,201. The OCC's determination properly reflects the historic role of banks as financial intermediaries and correctly construes Section 24 (Seventh) to permit banks to offer new financial products, such as annuities, which their customers demand.

The business of banking is one of financial intermediation. As this Court has recognized, "[t]he very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from

place to place," *Auten* v. *United States Nat'l Bank*, 174 U.S. at 143 (citing *Curtis* v. *Leavitt*, 16 N.Y. 9 (1857)), and banks are "the intermediaries in most financial transactions." *Philadelphia Nat'l Bank*, 374 U.S. at 326; *see also Delaware* v. *New York*, 113 S. Ct. 1550, 1554 (1993) ("in the modern financial services industry," banks serve as "financial intermediaries" in the "clearing[]" of "securities transactions"); *Auten*, 174 U.S. at 142 (quoting GILBART ON BANKING, vol. 1, p. 2) (a banker is "a dealer in capital"); *Block* v. *Pennsylvania Exch. Bank*, 253 N.Y. 227, 230-31, 170 N.E. 900, 901 (1930) (Cardozo, J.) ("The central function of a commercial bank is to substitute its own credit, which has general acceptance in the business community, for the individual's credit, which has only limited acceptability. . . . Whatever is an appropriate and usual incident to this substitution or exchange of credits, instead of being foreign to the functions and activities of banking, is in truth of their very essence.").

Banks serve as financial intermediaries both as principals and as agents. As principals, banks receive deposits from certain customers and extend credit to other customers. As agents, banks sell financial investment instruments and obligations, including loans, deposits, commercial paper, bonds, stocks and futures, issued by other parties to bank customers. Not all of these instruments and obligations were in existence at the time of the enactment of the NBA; many grew out of the changing requirements of bank customers and the economy. Annuities are simply another such financial investment instrument.

The court below completely ignored that banks "long have arranged the purchase and sale of securities as an accommodation to their customers." *Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 207, 215 (1984). "Congress expressly endorsed this traditional banking service" in enacting the Glass-Steagall Act and, thus, approved in Section 24 (Seventh) the power of banks to

broker securities for their customers "'to the same extent as heretofore.'" *Id.* at 215 & n.13 (quoting S. Rep. No. 77, 73d Cong., 1st Sess. 16 (1933)). The fact that the incidental powers clause authorized national banks to broker securities prior to the passage of the Glass-Steagall Act makes clear that such banks possessed the power to broker other financial investment instruments as well.

The power of commercial banks to broker securities—and, by extension, other forms of financial investment instruments—was so well established that in 1930 then-Chief Judge Cardozo of the New York Court of Appeals recognized that "[t]here is no question that the practice of banking as it has developed in our day" includes the brokerage of securities, and indeed, that "[t]he practice is so general that it may be the subject of judicial notice." *Block*, 253 N.Y. at 232, 170 N.E. at 901-02. Construing the New York Banking Law, the court did not confine the "business of banking" to the specific activities previously performed by commercial banks. Rather, "the [c]ourt acknowledged that the development and the evolution of business must be considered." *NYSALU*, 83 N.Y.2d at 362, 632 N.E.2d at 880, 610 N.Y.S.2d at 474 (explaining *Block*).

The New York Court of Appeals recently relied upon *Block*, and its focus on the function of banks as financial intermediaries, in approving the brokerage of annuities by New York-chartered banks. *See NYSALU*, 83 N.Y.2d at 362, 632 N.E.2d at 880, 610 N.Y.S.2d at 475 (quoting *Block*, 253 N.Y. at 232, 170 N.E. at 901) ("the test of a bank's power to undertake certain activities 'is the relation of the act to that substitution of credits which is of the essence of the banking function'"). The court stressed that "State-chartered commercial banks commonly broker other financial investment instruments, including certificates of deposit and various types of securities, which closely resemble annuities." *Id.* at 364, 632 N.E.2d at 882, 610 N.Y.S.2d at 476.

Because the brokerage of financial investment instruments has historically been performed by, and is one of the functions of, national banks, the OCC reasonably determined that the brokerage of annuities is part of the "business of banking."

D. The Brokerage of Annuities by National Banks Is Supported by Sound Banking Policy.

In construing the scope of the "business of banking" powers of national banks, this Court has taken into account the impact of a particular activity on bank safety and soundness. *See*, *e.g.*, *Awotin* v. *Atlas Exch. Nat'l Bank*, 295 U.S. 209, 214 (1935) ("purpose and effect of the [NBA] is to protect their depositors and stockholders and the public from the hazards of contingent liabilities"); *Texas & Pac. Ry.* v. *Pottorff*, 291 U.S. 242 (1934) (national bank's pledge of its assets to secure deposit "contrary to good banking practice"); *First Nat'l Bank* v. *Converse*, 200 U.S. 425, 439 (1906) (national bank may not "engage in or promote a purely speculative business or adventure").

There is no evidence that permitting national banks to broker annuities would jeopardize their safety and soundness. Because national banks act only as agents for the sale of annuities—and not as the issuer—they incur no principal risk, no interest rate risk, and no actuarial risk. On the contrary, barring national banks from the brokerage of annuities would place national banks at a competitive disadvantage vis-a-vis New York-chartered banks (and banks chartered by other States that follow the New York approach) and other financial intermediaries (including brokerage and insurance companies with bank affiliates) that possess the power to broker annuities. The existence of such fundamental differences in the powers of national and state-chartered banks is contrary to Congress's intent in enacting the NBA and would sharply devalue the charters of national banks by retarding necessary innovation by those banks.

In any event, *Chevron* required the lower court to defer to the OCC's determination that the brokerage of annuities by national banks (i) is a "logical complement to other financial services [banks] offer[]," such as investment advice and discount brokerage services, (ii) "will provide a valuable additional source of income and will help [such banks] compete effectively with other providers of financial services," and (iii) will "benefit" consumers by "increas[ing the] range of products made available" to them. (47a-48a).

* * *

The foregoing considerations establish that Section 24 (Seventh) authorizes national banks to broker annuities and dispel any notion that Congress has legislated to the contrary. Even if these considerations were less definitive, the Fifth Circuit had no basis to substitute its own views for the reasonable interpretation of the OCC. Under *Chevron*, absent "clear" evidence of congressional intent to bar the brokerage of annuities, *Chevron*, 467 U.S. at 842, the Fifth Circuit was required to defer to the OCC.

IV. SECTION 92 DOES NOT LIMIT THE "BUSINESS OF BANKING" POWERS OF NATIONAL BANKS.

Having erroneously concluded that annuities are a form of "insurance" (10a), the Fifth Circuit compounded its error under *Chevron* by holding that Section 92 bars national banks in communities of more than 5,000 persons from acting as sales agents for *all* "insurance" products, even those that *are* incidental to the business of banking. (*See* 14a-17a). This conclusion conflicts with Section 92's language and legislative history, which, as the OCC determined (42a-43a), demonstrate that that provision is a supplemental grant of authority to banks in small towns to engage in insurance-

related activities that are not within the business of banking.[16]

Although acknowledging its obligation under *Chevron* (8a-9a), the Fifth Circuit nonetheless rejected the OCC's position, reasoning that Section 92 "exhibits Congress' clear intent to permit only banks in towns of less than 5,000 inhabitants to sell insurance products." (9a). The Fifth Circuit first ignored the explicit statement in Section 92 that the powers conferred by that section were "*[i]n addition* to the powers now vested by law in national banking associations," 12 U.S.C. § 92 (emphasis added). This is an unequivocal statement that Section 92 imposes no limits on powers granted, by Section 24 (Seventh) or otherwise, to national banks but only supplements those powers. *See Independent Bankers Ass'n of Am.* v. *Heimann*, 613 F.2d. 1164, 1170 n.18 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). In addition, Section 92's legislative history indicates that "Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance." *Independent*

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[16] Section 92 provides:

"*In addition to the powers now vested by law in national banking associations* organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may, under such rules and regulations as may be prescribed by the [OCC], act as the agent for *any fire, life, or other insurance company* authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees between the said association and the insurance company for which it may act as agent." (Emphasis added).

Ins. Agents of Am., Inc. v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984).[17]

The court below then attempted to support its strained construction of Section 92 by relying on its prior decision in *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968), rendered sixteen years before this Court's decision in *Chevron*. (6a, 16a-17a). In *Saxon*, the Fifth Circuit did not defer to the OCC's interpretation of Section 92 (as is now required by *Chevron*), but instead misapplied the maxim of construction *expressio unius est exclusio alterius* to conclude that Section 92 implicitly bars national banks located outside of small towns from operating a general life and casualty insurance agency. 399 F.2d at 1013-14.

The Fifth Circuit's continued reliance upon the maxim of *expressio unius* was entirely misplaced. (*See* 15a-16a). Even if it had been proper to apply this maxim in construing Section 92, that analysis could have at most demonstrated that the statute impliedly bars national banks in towns of more than 5,000 persons from engaging in general insurance activities if such activities are *not* incidental to the business of banking. Section 92 does not address—and, thus, the maxim cannot be invoked to restrict—the powers granted to national banks by Section 24 (Seventh) to engage in insurance-related activities that *are* incidental to the business of banking. *Cf. Springer* v. *Government of the Philippine Islands*, 277 U.S. 189, 206 (1928) (maxim of *expressio unius*

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[17] Section 92's sponsor, Senator Owen, described this provision as "giving some additional powers to the small banks to act as agents in insurance matters." 53 CONG. REC. 11,002 (1916); *see also* 53 CONG. REC. 11,001 (1916) (OCC statement that Section 92 was based on consideration of "how the powers of these small national banks might be enlarged").

"must yield whenever a contrary intention on the part of the law-maker is apparent").

Moreover, the OCC's determination that Section 92 applies only to the activities of national banks acting as agents for "general" forms of insurance, such as "fire" and "life" insurance, is supported by the principle *ejusdem generis*—a general term in a statutory list "should be understood in light of the specific terms that surround it." *Hughey* v. *United States*, 495 U.S. 411, 419 (1990). Under the Fifth Circuit's expansive reading of Section 92, the statutory terms "fire" and "life" insurance would be mere surplusage, because all forms of insurance are included in the phrase "any . . . insurance company." In contrast, the OCC's interpretation gives effect to each word of the statute, by reading Section 92 as addressing only the general forms of insurance enumerated in the provision.

Contrary to *Chevron*, the panel below rejected the OCC's determination even though the OCC's position is consistent with the decisions of two other courts of appeals. *See Independent Bankers Ass'n* v. *Heimann*, 613 F.2d at 1170 (upholding the OCC's ruling that national banks outside of small towns could sell credit life insurance); *Independent Ins. Agents* v. *Board of Governors*, 736 F.2d at 477 n.6 (upholding Federal Reserve's approval of application to engage in credit-related property and casualty insurance, and noting "strong argument" that *Saxon* was "wrongly decided"). This conflict demonstrates that the statute does not clearly evince Congress's intent to bar banks from brokering annuities. On the contrary, these decisions confirm, at the least, that the OCC had a reasonable basis for its determination that Section 92 should not be read to have that effect.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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July 29, 1994

(12) (12)

Nos. 93-1612, 93-1613

IN THE
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OCTOBER TERM, 1994

EUGENE LUDWIG,
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v.
VARIABLE ANNUITY LIFE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

The American Academy of Actuaries submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of the respondent in Nos. 93-1612 and 93-1613, having obtained the written consent of both the petitioners and the respondent to do so. Said written consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for actuaries of all specialties (including life insurance) practicing within the United States and to seek greater public recognition for the actuarial profession. To become an

Academy member, an actuary must satisfy rigorous education and experience requirements, including successful completion of a series of examinations in relevant areas of actuarial practice. Membership in the Academy is a requirement in many states to perform certain types of actuarial work. The Academy's primary activities include liaison with federal and state governments, relations with other professions, dissemination of public information about the actuarial profession, and the promulgation and implementation of standards of professional conduct, practice and qualification. The Academy's membership exceeds 11,000 actuaries nationwide.

The Academy has approximately three thousand members who provide actuarial services to life insurance companies; the Academy believes that nearly all of those companies offer fixed or variable annuities among their insurance products. The Academy anticipates that the Court's decision in this case may have a significant effect upon the professional practices of these actuaries, to the extent that annuities are deemed by the Court not to constitute "insurance." Further, the Academy believes that the perspective of its members who work regularly with life insurance products, including annuities, may be useful to the Court as it seeks to determine whether annuities constitute "insurance" for purposes of 12 U.S.C. § 92 (hereinafter "Section 92"). Accordingly, the Academy has a substantial interest in this proceeding.

SUMMARY OF ARGUMENT

Annuities have historically been recognized by insurance experts as a form of insurance. Both annuities and life insurance policies involve transfer of mortality risk, a risk that is evaluated by actuaries in both instances through application of the same mathematical principles and techniques. Actuaries who wish to practice in the life insurance field must pass a series of examinations that includes questions on annuities, and actuarial textbooks on life insurance routinely address annuities. Thus,

for actuarial purposes, life insurance policies and annuities are both forms of insurance.

The fact that annuities involve an investment element as well as an element of mortality risk does not mean that annuities are not a form of insurance. As the Court has recognized, life insurance and annuities are continually evolving as new products are developed. Many forms of life insurance involve significant investment elements and are purchased by consumers for their investment value. To conclude that annuities cannot be "insurance" merely because they may possess some investment value would suggest that life insurance policies with significant investment elements might not be "insurance," a result that the Academy believes cannot be intended by the Court.

States regulate annuities, like life insurance policies, under their insurance laws. If the Court determines that annuities are not "insurance," the Court's determination could call into question states' authority to regulate annuities. Further, a finding that annuities are not "insurance" could lessen the perceived need for actuaries to participate in the development of annuity products; such a result would be harmful to the public because annuities designed and priced without the expert guidance of an actuary would almost certainly be less reliable.

ARGUMENT

In order to address the central issue presented by this case, specifically, whether national banks (wherever located) are permitted by federal law to act as agent in the sale of annuities, the Court must determine whether annuities are or are not a form of "insurance." It is to this narrow issue that the Academy's comments are addressed.[1]

I. THE HISTORIC LINK BETWEEN LIFE INSURANCE AND ANNUITIES

Life insurance, in its most classic form, contemplates that the insured pays a periodic premium to the insurer in exchange for payment by the insurer to a designated beneficiary upon the insured's death. Thus, the risk of death is transferred from the insured to the insurer, insofar as the insurer "gambles" that the insured will die before paying a sufficient premium to cover the cost of the death benefit. *See generally* MacLean, *Life Insurance* at 3-9 (9th Ed. 1962). Life annuities, in their simplest form, require the annuitant to pay a premium to an insurer, which then promises to make regular periodic payments to the annuitant until the time of the annuitant's death. *Id.* at 53. With annuities, the insurer "gambles" that the annuitant will live longer than anticipated, thereby receiving a greater number of payments than the cost to set up the annuity. Thus, both life insurance policies and annuities traditionally have involved a significant element of mortality risk and an acceptance of that risk by the insurer.

Since the inception of the life insurance industry in the United States, life insurance policies and annuities have

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[1] The Academy takes no position with regard to the issues of whether Section 92 prohibits national banks from acting as agent for sales of insurance products in communities with more than 5,000 inhabitants or whether the sale of annuities is "necessary to carry on the business of banking" under 12 U.S.C. § 24(7).

been inextricably linked. Both life insurance policies and annuities have traditionally been sold by the insurance companies, and nearly all life insurance companies sell annuities. *Id.* Legal and other authorities on the subject of insurance traditionally view life insurance policies and annuities as mirror images of each other, recognizing both as forms of "insurance." *E.g.,* Harnett and Lesnick, *The Law of Life and Health Insurance* § 1.01 (1993) (noting similarities in adverse contingencies between life insurance policies and annuities); Black and Skipper, *Life Insurance* at 101 (11th Ed. 1987) ("[d]espite the difference in function, annuities are simply another type of insurance and both life insurance and annuities are based on the same fundamental principles").

Further, because both life insurance policies and life annuities require the estimation of mortality rates for purposes of setting premiums, life actuaries have historically been deeply involved in their development and pricing. Indeed, the individual who is generally recognized as the first actuary in the United States, Jacob Shoemaker, was employed by a company with the title, "Pennsylvania Company for Insurance on Lives and Granting Annuities." Moorehead, *Our Yesterdays: the History of the Actuarial Profession* at 4 (1989). In his annual report to the company's board of directors, Mr. Shoemaker specifically observed that life insurance and annuity contracts to be offered by the company " 'will be governed by the same principles (viz.) a combination of the casualties of life with the Interest [*sic*] of money.' " *Id.* at 4-5, *quoting* Actuarial Report of Jacob Shoemaker (1813). The actuarial profession has been involved in determining mortality and interest rates for life insurance policies and annuities ever since. *See* Moorehead, *supra,* at 113-15 (describing efforts by the actuarial profession to develop reasonable life insurance policy and annuity premiums over the last fifty years).

II. THE ACTUARIAL LINK BETWEEN LIFE INSURANCE AND ANNUITIES

An actuary's duties when dealing with life insurance policies and annuities are essentially identical. With both products, the actuary makes use of a pooling technique with regard to prospective purchasers, refers to applicable mortality tables,[2] pinpoints a likely interest rate and, by applying the relevant presumptions to potential purchasers, determines what premium the insurer must charge to avoid a loss on the product. This function is essential to the work of a life actuary. "Annuity theory plays an important role in actuarial calculations because premium payments *to* a life insurance company by a policyholder constitute an *annuity due to the company*." Black and Skipper, *Life Insurance, supra* at 323 (emphasis in original).

Annuity practice is considered by the actuarial profession to be a basic part of life insurance practice. Life actuaries study mortality and interest assumptions for annuities as part of their professional eduction. *See* Associateship and Fellowship Catalog of the Society of Actuaries at 48, 51-52 (Fall Ed. 1994). Actuarial textbooks on life insurance routinely cover annuities as well. *See, e.g.*, Spurgeon, *Life Contingencies* at 31-94 (1951); Jordan, *Society of Actuaries' Textbook on Life Contingencies* at 37-62, 221-36 (1952). In order to obtain academic credentials from the Society of Actuaries, a prerequisite to Academy membership for life actuaries,[3]

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[2] It should be noted that the mortality tables used for life insurance policies and annuities are not identical. This is not because the products differ in underlying principles, but because annuity purchasers have tended to be healthier and longer-lived than the general population and therefore require use of presumptions based on a slightly different set of facts. MacLean, *Life Insurance, supra* at 54; Black and Skipper, *Life Insurance, supra* at 318-19.

[3] To qualify for Academy membership, property and casualty actuaries must obtain academic credentials from the Casualty Actuarial Society; pension actuaries must obtain credentials from

would-be life actuaries must complete a series of examinations that include questions on annuities. Associateship and Fellowship Catalog, *supra* at 15-19.

From an actuarial perspective, it makes no difference whether annuities are fixed or variable for purposes of determining mortality risk. As this Court has recognized, fixed and variable annuities "are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. That risk is an actuarial prognostication that a certain number of annuitants will survive to specified ages." *Securities & Exchange Commission v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 70 (1959). Admittedly, variable annuities may involve a greater element of investment risk to the annuitant than fixed annuities, insofar as variable annuities issue payments that vary depending on the insurer's investment success. However, for the reasons described in Section III(C) below, the fact that an insurance product has a significant investment element does not, in the Academy's view, mean that the product is not "insurance" and is merely an investment vehicle.

III. LIFE INSURANCE AND ANNUITIES SHARE INVESTMENT VALUE

Petitioners and their *amici* make much of *Securities & Exchange Commission v. Variable Annuity Life Insurance Co., supra,* and its progeny, arguing that variable annuities, at the very least, cannot be considered insurance. This Court in *Helvering v. Le Gierse,* 312 U.S. 531 (1941), defined insurance as involving "risk-shifting and risk-distributing." *Id.* at 539. The Court determined in *Securities & Exchange Commission v. Variable Annuity Life Insurance Co., supra,* that for purposes of registering variable annuities under the Securities Act, "the issuer of a variable annuity that has no element of a fixed return

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the Society of Actuaries or the Joint Board for the Enrollment of Actuaries.

assumes no true risk in the insurance sense." *Id.* at 71. From this, petitioners argue that variable and other annuities cannot be deemed "insurance," because the risk transferred between the insurer and the annuitant is an "investment risk," not an "insurance risk."

The Academy respectfully disagrees with this argument. As the Court has recognized, "life insurance is an evolving institution." *Id.* New products are continually being developed, both in the form of life insurance policies and annuities. Variable life insurance contracts are comparable to variable annuities, in that the death benefits or cash value of the policies vary depending on the insurer's success in the stock market. Black and Skipper, *Life Insurance, supra* at 68-69. Current assumption whole life contracts use current interest rates in cash value determination and make use of an indeterminate premium structure. *Id.* at 71-74. Universal Life contracts allow for flexible premiums and depend heavily on the insurer's investment success to determine the value of the policy. *Id.* at 83-85. Even more traditional life insurance contracts typically are assigned a cash surrender value, and may be used as an investment vehicle. Indeed, *any* life insurance contract that calls for the payment of level premiums contains at least some element of investment. MacLean, *Life Insurance, supra* at 19. For this reason, all insurance policies, and particularly the more innovative policies, can be and often are purchased by consumers for their investment value. Black and Skipper, *Life Insurance, supra* at 26. However, one could not, in the Academy's view, convincingly argue that these products are not "insurance."

Some forms of annuities may be sufficiently investment-oriented that it becomes appropriate for a purchaser to "be afforded the same advantages of disclosure which inure to a mutual fund purchased under § 5 of the Securities Act." *Securities Exchange Commission v. United Benefit Life Insurance Co.*, 387 U.S. 202, 211 (1967). From the Academy's perspective, however, it is the trans-

fer of insurance risk, and not the potential investment value, that makes a product "insurance." When annuities involve mortality risk, they remain essentially insurance, even if they also have attractive investment potential.

IV. STATES SHOULD RETAIN THEIR AUTHORITY TO REGULATE ANNUITIES

A decision by the Court that annuities are not "insurance" for purposes of Section 92 could have other implications as well. As the Court of Appeals correctly observed, the states currently regulate annuities through their insurance codes and regulations. *Variable Annuity Life Insurance Co. v. Clarke*, 1993 U.S. App. LEXIS 21592 (5th Cir. 1993) (Pet. App. 11(a)) (collecting authorities). If the Court were to conclude that annuities are not, in fact, "insurance," the authority of states to regulate their development and sale could be called into question.

Moreover, the mortality risk that is typically associated with annuities renders the setting of annuity premiums a task requiring considerable expertise. Life insurers, and the actuaries who work with them, have the necessary skills and experience to evaluate mortality risk, and to set premiums at appropriate levels. A finding that annuities are not "insurance" could undermine the importance of actuarial participation in the development of annuities, thereby increasing the risk that annuities developed and sold in the future will not be actuarially sound.

"Only a life insurance company can guarantee that a given sum can be scientifically liquidated in equal installments over the duration of a human life." Black and Skipper, *Life Insurance, supra* at 101. The Academy would add that even life insurance companies are only able to do so through the expertise of their actuaries. The Academy urges the Court not to issue a decision in this case that would call into question the unique ability of insurance companies and their actuaries to design annuities.

CONCLUSION

For the foregoing reasons, the Academy respectfully requests that, with respect to the question of whether annuities constitute "insurance," the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

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September 7, 1994

(14) (14)

Nos. 93-1612, 93-1613

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BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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September 8, 1994

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

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BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurance ("ACLI") is a non-profit trade association of 640 stock and mutual life insurance companies. Collectively, ACLI member companies hold approximately 91 percent of the life insurance in force in the nation. ACLI member companies market fixed and variable annuities in all fifty states, and have always regarded annuities

as a true insurance product. ACLI has long been active in administrative, legislative, and litigation matters regarding the permissible scope of insurance activities by banks.

ACLI has a strong interest in this case because its members will suffer substantial competitive injury if all national banks are permitted to sell annuities. In addition, the Comptroller's determination that annuities are "financial investment instruments," and not "insurance" products, might erode the critical distinction between "insurance" and true financial instruments which applies under Federal tax and securities laws.

By permitting all national banks to sell annuities, the Comptroller misinterpreted Congress' direction in 12 U.S.C. § 92 ("Section 92") that only national banks located in small towns may sell insurance. The Comptroller's unilateral decision also undermines the barriers between banking and insurance which Congress has erected to ensure stability and fairness in financial markets and in the insurance industry.

SUMMARY OF ARGUMENT

The Comptroller's decision to allow all national banks to sell annuities is contrary to law and is not entitled to deference. Petitioners invoke this Court's ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) as a talisman to ward off meaningful judicial review of the Comptroller's decision. But petitioners' heavy reliance upon *Chevron* betrays a fundamental misconception of the proper roles of the judicial and executive branches of government and far exceeds the logical underpinnings of that precedent.

ARGUMENT

THE COMPTROLLER'S APPROVAL DOES NOT MERIT DEFERENCE

The court of appeals held in this case that "[i]t is plain from the language of the statute, and from the legislative history, that § 92 prohibits national banks . . . from selling insurance products in towns with population greater than 5,000." NationsBank Pet. App. 10a. The court of appeals also correctly concluded that "annuities are an insurance product, both historically and functionally." *Id.* Finding that the intent of Congress was clear, the court of appeals held that deference to the Comptroller's statutory interpretation was not appropriate under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). NationsBank Pet. App. 9a.

Nevertheless, petitioners insist that Section 92 contains latent ambiguities and that, under *Chevron*, the Comptroller's contrary interpretation therefore should trump the court of appeals' careful construction of Section 92. Petitioners' invocation of *Chevron* far exceeds the rationale of that decision, however, and minimizes the proper role of the judiciary in our government.

A. The Constitutional Separation of Powers Both Animates *Chevron* and Limits It

"The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. From the founding of the Republic, this grant of authority has been interpreted to mean that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803); *see also United States v. Nixon*, 418 U.S. 683, 705 (1974) ("reaffirm[ing] that it is the province and duty of this

Court 'to say what the law is'") (quoting *Marbury*). As this Court explained in *INS v. Chadha*, 462 U.S. 919, 951 (1983):

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limit of its power, even to accomplish desirable objectives, must be resisted."

The constitutional separation of powers was not instituted to "promote governmental efficiency" but rather "as a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965); *Chadha*, 462 U.S. at 959 ("Framers ranked other values higher than efficiency"). Each Branch, therefore, has a constitutional duty to prevent the other Branches from encroaching upon their assigned responsibility. Indeed, the Constitution not only enables the Branches to safeguard their powers from invasion by the other Branches, but also requires "that none of the Branches will *itself* alienate its assigned powers." *Peretz v. United States*, 501 U.S. 923, 956 (1991) (Scalia, J., dissenting) (emphasis in original).

The principles articulated in *Chevron* derive from separation of powers concerns, as the Court sought to accord proper scope to the decisions of administrative officers that were based on powers expressly delegated to those officers by Congress. Nevertheless, there are important limits on administrative discretion which also derive from the need to preserve constitutional separation of powers. Just as the constitutional structure protects the powers of executive officials, it also ensures that legal restrictions placed on those officials by Congress will be enforced by the courts. Indeed, the Administrative Procedure Act also commands that "the reviewing *court* shall decide all

relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706 (emphasis added). Thus, courts reviewing agency interpretations of law must not "slip into judicial inertia" or "rubber stamp" agency decisions. *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) and *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965)).

B. The *Chevron* Ruling Was Based On Five Factors Present in That Case

To understand the constraints on executive discretion that are inherent in *Chevron*, it is important to review the case itself, which can be obscured by the enthusiastic pleadings of executive agencies and their client entities seeking to vindicate agency actions. *Chevron* considered the meaning of the term "stationary sources" as used in the Clean Air Act Amendments of 1977. Pursuant to its statutory authority to administer and interpret the Act, the EPA published regulations allowing states to treat all pollution-emitting devices within the same industrial grouping as a single "stationary source" (or "bubble"). Although the Court ultimately concluded that the statutory language was "not dispositive" (467 U.S. at 862), the Court independently construed the meaning of the statute before concluding that EPA's interpretation was sound.

After carefully examining the language and structure of the Act and the relevant legislative history, the Court observed that EPA's interpretation was supported by the definition of "stationary source" in another section of the Act.[1] 467 U.S. at 860. The Court also pointed to the use of the word "facility" in the Act's definition of "major stationary source." *Id.* at 851. The Court held that the "ordinary meaning" of the term "facility" in those

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[1] The statute defined "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant." Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676.

definitions "connote[s] an entire plant as opposed to its constituent parts." *Id.* at 860. The Court observed that the definitions "shed[] as much light on the meaning of the word 'source' as anything in the statute" and "impl[y] a bubble concept of sorts." *Id.* at 860-61. The Court also added that the "plantwide definition" adopted by EPA was "fully consistent" with the policy concerns that motivated enactment of the statute. *Id.* at 863.

Having conducted its own analysis of the statute, the Court concluded that EPA's regulation was "a reasonable accommodation of manifestly competing interests and is entitled to deference." *Id.* at 865. The Court gave several reasons why deference was appropriate (*id.* at 862, 865-66):[2]

(1) The statute did not "reveal an actual intent of Congress."

(2) Congress expressly or implicitly left a "gap" for the agency to fill.

(3) "[T]he regulatory scheme is technical and complex," the agency has "great expertise," and "[j]udges are not experts in the field."

(4) "[T]he agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."

(5) The Chief Executive is accountable to the people, but judges "are not part of either political branch of the Government." Agencies, therefore, are better positioned to make "policy choices."

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[2] These reasons often have been repeated in subsequent cases applying *Chevron*. *See, e.g.*, *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (statute produced "complex and highly technical regulatory program" "requir[ing] significant expertise" and exercise of policy judgments); *Dole v.*

C. The Five Factors Supporting Deference In *Chevron* Are Not Present Here

Although five reasons supported deference to the agency action in *Chevron*, in this case four of them militate against judicial deference to the Comptroller's action, and the impact of the fifth factor is ambiguous.

1. The Intent of Congress in Section 92 Is Clear

As the court of appeals held, application of the maxim *expressio unius est exclusio alterius* demonstrates that Congress intended to limit insurance agency activities to national banks located in small towns. NationsBank Pet App. 10a; Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829, 839 (1990) (*expressio unius* canon is particularly apt tool under *Chevron* to determine congressional intent).[3] The legislative history confirms this conclusion. *See* 53 Cong. Rec. 11,001 (1916) (insurance agency "authority should be limited to banks in small communities"). Even the Comptroller now concedes this point. *See* Fed. Br. at 40-41. The court of appeals further concluded that annuities are properly regarded as a form of insurance. NationsBank Pet. App. 10a. Since the traditional tools of statutory construction establish the intent of Congress, "that is the end of the matter," and this case presents no basis for deferring to the Comptroller. *Chevron*, 467 U.S. at 842-43.

United Steelworkers, 494 U.S. 26, 42-43 (1990) (deference not appropriate where intent of Congress is clear); *United States v. Fulton*, 475 U.S. 657, 666-667 (1986) (statute unclear on question of "interim" rate making authority; conflicting policies committed to agency's care by statute); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (EPA "charged with administering" "complex statute").

[3] This Court has long considered *expressio unius* to be "an universal maxim in the construction of statutes." *United States v. Arredondo*, 6 Pet. (31 U.S.) 691, 725 (1832); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (applying maxim).

Even if a court finds some ambiguity regarding Congress' intent, deference to the agency's view is not necessarily appropriate. To read *Chevron* as laying down a "blanket rule" that courts must "always defer to the agency when the statute is silent" would be "seriously overbroad, counterproductive and sometimes senseless." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 373 (1986). As one *Chevron* proponent aptly observed, nearly every statute, if studied hard enough, can be made to yield up some ambiguity. *See* Laurence H. Silberman, *Chevron — The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 826 (1990). But if that ambiguity always means that courts must defer to administrative interpretations, then the judicial role "to say what the law is" will have been greatly diminished. *Cf. Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) ("[d]eference does not mean acquiescence"); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (*Chevron* is "not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us").

The extent to which a court will defer to an administrative interpretation should be proportional to the level of ambiguity inherent in the statute. Deference, therefore, is most appropriate when the agency's interpretation is as plausible as competing interpretations. *See, e.g., United States v. Fulton*, 475 U.S. 657, 667 (1986) (agency construction was "as consistent with the bare statutory language" as alternative interpretation). Even if an agency's interpretation is doubtful, substantial ambiguity in the statute may prevent the court from concluding that the agency is wrong. Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2092 (1990); *cf. MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2231 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear"). At some point, the agency's view

becomes so stretched as to be unreasonable, and deference ceases. *Chevron*, 467 U.S. at 843. But since any statutory ambiguity in this case is small and the Comptroller's interpretation is unsupported by any statutory language, his views are not entitled to deference.

2. Section 92 Leaves No "Gap" for the Comptroller to Fill

Unlike *Chevron* and many of its progeny, Congress did not leave a gap in Section 92 for the Comptroller to fill. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (collecting authorities); *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring); Sunstein, at 2076. Congress has not given the Comptroller broad authority to administer the statute or to promulgate interpretive or legislative regulations. Nor, for that matter, does the statute appear to leave undefined any terms for later administrative clarification.

To the contrary, Section 92 is a straightforward declaration on the insurance powers of national banks. Nothing in the statutory language or legislative history suggests that the term "insurance" meant anything other than "its accepted ordinary commercial usage": a usage that surely encompassed annuities. *Federal Reserve Bd. v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986) (Board's evolving definition of "commercial loan" was unreasonable).

The Comptroller's only role under Section 92 is to make rules regulating the manner in which small-town national banks may exercise their insurance agency powers. The statute provides that small-town national banks "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as agent for any . . . insurance company . . . ." The Comptroller's delegated authority is thus to regulate the insurance activities of these national banks in smaller communities,

but does not include the power the Comptroller now claims to grant insurance powers to all of the other national banks.

3. Section 92 Establishes a Simple Regulatory Structure

The regulatory scheme established by Congress in Section 92 is simple, not complex. Either a bank is located in a town with a population of 5,000 or less, or it is not; either such a small-town national bank is acting as an agent for an insurance company in the sale of insurance, or it is not. These straightforward either-or propositions bear no resemblance to complex regulatory schemes, such as the environmental legislation in *Chevron* or the black lung benefits program in *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991). There is no scientific inquiry in this case; nor are there feasibility or practicability studies or decisions to be made. In fact, Section 92 includes no technical words or terms of art.

Because of this textual and conceptual simplicity, the Comptroller is no better qualified to interpret the statute than is this Court. Accurate interpretation of Section 92 does not require knowledge peculiarly within the expertise of the Comptroller: it simply requires faithful adherence to the text and cognizance of the applicable legislative history and historical context. Deciding questions of law is what courts do best, and is a peculiarly judicial function. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) ("pure question of statutory construction [is] for the courts to decide"); Sunstein, at 2076, 2084-85.

To the extent that any expertise is required to interpret Section 92, moreover, the subject of that expertise is insurance, a topic on which the Comptroller has greater experience in purchasing the product as a consumer than regulating it as a public official. In fact, Congress has acknowledged that the States, not the federal government, possess expertise in insurance matters. Congress' recognition of the "supremacy of the

States in the realm of insurance" is codified in the McCarran-Ferguson Act, 59 Stat. 34 (1945). *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993). Given the uniform view of the States that annuities are insurance, *see* NationsBank Pet. App. 11a, the Comptroller's contrary determination is highly suspect.[4]

Indeed, the Comptroller's analysis of annuities is contrary to basic insurance principles implemented by ACLI's members every day. The Comptroller discounts the risk-shifting and risk-distributing features of annuities when he claims that annuities cannot be insurance because they do not provide indemnification, and when he asserts that annuities cannot be insurance because they contain significant investment features.[5]

[4] Amicus American Bankers Association (ABA) seeks to challenge the court of appeals' related determination that the sale of insurance is not incidental to banking by suggesting in its brief (p. 13) that "as many as thirty-four states allow their own state-chartered banks to engage in the insurance agency business in some form or another." The brief then directs attention to an Appendix, which contains a chart referring to the laws or regulations or supposed administrative practices of 45 states. This assertion is very misleading.

Of the 34 states claimed to give insurance agency powers to state-chartered banks, ten states have statutes like Section 92, giving insurance agency powers only to banks in towns of 5,000 or fewer inhabitants (Arkansas, Colorado, Florida, Georgia, Kansas, Minnesota, Missouri, New Mexico, and Washington), or 7,000 or fewer inhabitants (Mississippi). Four more of the states claimed by the ABA actually prohibit insurance sales except for grandfathered institutions (Connecticut, Kentucky, Tennessee, and Louisiana). One state merely allows a bank to own up to 25 percent of an insurance agency. Me. Rev. Stat. Ann. tit. 24-A, § 1514-A (West 1993). Another state specifically denies state banks the power to act as agent for life insurance companies. Ind. Code Ann. § 28-1-11-2 (Burns 1994). Contrary to the impression created by the ABA, Alaska prohibits state-chartered banks to sell insurance. Alaska Stat. § 06.05.272(d) (1993). Thus, out of the 34 states that the ABA claims permit state banks to sell insurance, only half (17) do so in a way that appreciably exceeds the scope of Section 92.

[5] This Court has long understood that insurance does not necessarily involve indemnification and that insurance often performs an investment

But the ACLI members who have issued 90% of the $1,041,226,000,000 of annuities currently in force know that they have assumed concrete mortality risk with every life annuity sold. That mortality risk is not changed in any material way because annuities, like many forms of insurance, may also serve an investment function. Rather than assisting the Court with his superior experience, the Comptroller largely has provided misconceptions regarding insurance in his attempt to find statutory ambiguity where there is none.

4. The Comptroller's Unilateral Action Involved No Deliberative or Participatory Procedures

There is no indication that the Comptroller heard both sides of this dispute in order to "consider[] the matter in a detailed and reasoned fashion" or "reconcil[e] competing policies." *Chevron*, 467 U.S. at 865. The Comptroller received a request from NationsBank for insurance agency powers, and granted it. There was no adversarial hearing, as there would been if the Comptroller had made an adjudicative determination. There was no opportunity for public notice and comment, as there would have been if the Comptroller had promulgated a legislative regulation. The Comptroller's decision was reached behind closed doors, after hearing only from NationsBank. A decision reached through such a one-sided process neither inspires confidence nor commands deference.

The absence of any truth-protecting procedural safeguards in this case demonstrates why purely interpretive opinions of administrative agencies should not be entitled to special deference. Although an interpretive ruling, logically presented, may have the "power to persuade," it cannot have the "power to

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function. *See, e.g., Central Nat'l Bank of Washington v. Hume*, 128 U.S. 195, 205 (1888) (life insurance is not pure indemnity); *Grigsby v. Russell*, 222 U.S. 149, 156 (1911) (Holmes, J.) ("life insurance has become in our days one of the best recognized forms of investment;" view that life insurance is indemnity "long has disappeared").

control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive rules entitled only to "some weight on judicial review"). Last Term, the Court expressly reserved the question whether "an agency interpretation expressed in a memorandum" is entitled to "less deference under Chevron than an interpretation adopted by rule published in the Federal Register, or by adjudication." *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 n.5 (1994). Because "truth" "is best discovered by powerful statements on both sides of the question," *United States v. Cronic*, 466 U.S. 648, 655 (1984), it makes little sense to defer to decisions, like the Comptroller's Approval, that are reached without a full ventilation of the issue by affected parties.

The Comptroller in this case did not even purport to balance competing policies. His decision was motivated by a single policy: to "provide a valuable additional source of income" to national banks. NationsBank Pet. App. 47a. He cited Comptroller Williams' 1916 letter to Congress to support this policy (NationsBank Pet. App. 42a), but utterly ignored the competing policies articulated by Comptroller Williams: (i) that the need for insurance revenue was peculiar to small-town banks; (ii) that banks should focus on banking; (iii) that confining insurance powers to small-town national banks would not "trespass upon outside business naturally belonging to others;" and (iv) that banks ought not to become like "department stores." 53 Cong. Rec. 11,001 (1916). The Comptroller's failure to hear both sides undercuts a central premise for deference under *Chevron* since he cannot "be trusted to give a properly balanced answer." Breyer, *supra*, at 371.

5. State Insurance Regulators Are Politically Accountable

The Comptroller is politically accountable whereas the courts are not. The Comptroller's comparative advantage over

the courts in political accountability is largely offset, however, by the overwhelming consensus among the States, who also are politically accountable, that annuities are insurance. *See* NationsBank Pet. App. 11a; VALIC Br. at 29-30. Many states also have adopted "anti-affiliation" statutes specifically barring banks from selling insurance. *E.g.*, Conn. Gen. Stat. Ann. § 38a-775 (West 1994); Fla. Stat. Ann. § 626.988 (West 1994); Pa. Stat. Ann. tit. 40, § 281(b) (1994).

Greater political accountability, however, cannot be the sole basis for special deference to statutory interpretations by administrative agencies without doing violence to the constitutional separation of powers. Indeed, the Framers carefully preserved the political independence of the judiciary when they provided for life tenure for federal judges. U.S. Const. art III, § 1. As this Court observed in *United States v. Nixon*, 418 U.S. at 704 (citations omitted):

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is. . . ."

CONCLUSION

Statutes "must get their final meaning from judicial construction." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). One leading commentator has observed that deference taken too far not only compromises the judicial function to interpret the law, but also threatens "the basic principle of congressional supremacy in lawmaking, risking as it would administrative subversion of statutory standards." Sunstein, *supra*, at 2093.

For all of the foregoing reasons, the Comptroller's decision to allow all national banks to broker annuities is not entitled to deference, and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 8, 1994

(16) (16)

Nos. 93-1612, 93-1613

IN THE

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OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,
v.
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Respondent.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, *et al.*,
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v.
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Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the American Land Title Association ("ALTA") with the written consent of counsel to all parties. Copies of such consent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Federal Petitioners and the NationsBank Petitioners urged this Court in their certiorari petitions to grant review based upon their conclusion that there was a conflict in the circuits over whether Section 92 of the National Bank Act, 12 U.S.C. § 92 (Supp. V 1993), constitutes a limitation on the insurance activities of national banks that the Comptroller of the Currency may authorize under the incidental powers provision of 12 U.S.C. § 24 Seventh (Supp. V 1993). Petitioners contrasted the decision below and the Second Circuit's decision in *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied sub nom. Ludwig v. American Land Title Ass'n*, 113 S. Ct. 2959 (1993) ("*ALTA v. Clarke*") on the one hand, and the D.C. Circuit's decision in *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"), on the other.[1]

Despite the importance of *ALTA v. Clarke* to their petitions, none of the petitioners or their many *amici* even mentions the case in their merits briefs. The omission is not surprising, since the petitioners apparently hope that, if the Court reverses the decision below, its opinion might inadvertently sweep in title insurance and reverse the Second Circuit's decision as well.

ALTA is a voluntary, non-profit incorporated trade association representing the Nation's land title industry. Organized under the laws of the District of Columbia, ALTA has approximately 2,300 members, including title insurance agents and title insurance companies doing business in all 50 states.

Title insurance is the business of insuring the interests in real property of owners, leaseholders, lenders, and others. Title insurance policies can only be issued on the

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[1] *See, e.g.*, Federal Petitioners Br. at 18-19; NationsBank Petitioners Br. at 22-24.

basis of a search and examination of the records and documents that establish or give notice of the rights, liens, claims and encumbrances that may exist with respect to the property. Because most real estate records are maintained at the local level, title insurance policies are typically issued at the local level, frequently by title insurance agents. These agents are generally responsible for the search and examination of the underlying title information, the determination (pursuant to underwriting guidelines established by the title insurance company) whether particular matters must be excepted from policy coverage or may be insured against, and for the issuance of the policies on behalf of the title insurance companies they represent.

On matters of common concern to the title insurance industry and its consumers, ALTA represents its members before courts, agencies, and the Congress. ALTA has participated as *amicus curiae* in this Court where the matter is likely to have a significant influence on the title insurance industry.[2] ALTA files this brief because of the potential that a reversal of the decision below might affect the finality of its own litigation against the Office of the Comptroller of the Currency ("OCC").

In 1986, the OCC issued an interpretive ruling that a national bank may act as an agent in the sale of title insurance in any community regardless of population if such activities are undertaken in transactions involving the bank's loans.[3] Based on this ruling, in 1989 the OCC

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[2] *See, e.g., United States v. 92 Buena Vista Avenue, Rumson, N.J.*, 113 S. Ct. 1126 (1993); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *United States v. Mottaz*, 476 U.S. 834 (1986); *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *United States v. Dunn*, 470 U.S. 39 (1985).

[3] OCC Staff Interpretive Letter No. 368, *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986).

approved the establishment by Chase Manhattan Bank of two operating subsidiaries with authority to issue title insurance in transactions involving residential and commercial mortgage loans. Prior to the OCC ruling, there was no evidence that national banks had ever engaged in the title insurance agency business.

ALTA filed suit against the OCC, urging that the OCC's ruling and approval be set aside as unlawful because it permitted a national bank to engage in title insurance agency activities that are (a) prohibited to them by 12 U.S.C. § 92 and (b) not authorized by 12 U.S.C. § 24 Seventh or any other provision of law. While ALTA lost on a motion to dismiss in the trial court, a unanimous panel of the Second Circuit reversed.

The Second Circuit concluded that the language and legislative history of 12 U.S.C. § 92 supported the finding that national banks were precluded from acting as insurance agents outside the provision's geographical restrictions. *ALTA v. Clarke,* 968 F.2d at 155-56. The court also rejected the OCC's alternative contention that title insurance, like credit life insurance in *Heimann,* was a " 'special' " type of insurance that fell outside Section 92's limits on national bank activity. 968 F.2d at 156-57. This Court denied certiorari.

Because the interpretation of Section 92 in this case may affect the title insurance industry as well, ALTA has a strong interest in the proper resolution of this case. ALTA seeks to demonstrate that the legislative history of Section 92 reveals that the only possible interpretation of the introductory language of the section is that Comptroller Williams (who drafted the language) and Congress were intending to make clear that the limited insurance agency powers granted by Section 92 were the sole insurance agency powers authorized for national banks. ALTA also seeks to show that petitioners' broad framework for determining when activities are "incidental" to "the business of banking" is contrary to the historical

jurisprudence in this area. Finally, ALTA files this brief to demonstrate that an affirmance of the decision below will not necessarily jeopardize the ability of national banks to continue to engage in credit-related insurance activities (such as credit life insurance) that the courts have found to be uniquely related to the business of banking in fundamental ways that are not shared by other kinds of insurance products, such as automobile, homeowners, and title insurance, or annuities.

SUMMARY OF ARGUMENT

1. Petitioners and their *amici* contend that Section 92 was an additional grant of insurance agency powers to small town banks that was not intended to limit those insurance agency powers that were provided to all national banks by the incidental powers provision of 12 U.S.C. § 24 Seventh, which was enacted some 50 years earlier. They claim that this interpretation is compelled by the introductory language to Section 92 ("In addition to the powers now vested by law in national banking associations under the laws of the United States . . ."). The legislative history clearly demonstrates, however, that this language reflects Congress' intent that Section 92 was the only authority for national banks to engage in insurance agency activities.

Section 92 was adopted on the recommendation of the Comptroller of the Currency, who drafted the provision and who laid out the reasons for its enactment in a letter to the chairmen of the House and Senate banking committees. This letter was reproduced in its entirety in the 1916 Congressional Record and is set forth in the Appendix to this brief. While the Comptroller indicated that it would be desirable to allow small town banks to realize additional revenue through the sale of insurance products, his letter made clear that under existing law "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies . . . ." App. at 3a. (This conclusion was

echoed in a memorandum published earlier in 1916 by the Federal Reserve Board.) After reviewing Supreme Court jurisprudence on the powers of national banks, he concluded that "[i]t is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." *Id.* On the basis of this letter and recommendation, Congress enacted Section 92 without further substantive debate.

In light of the conclusions so clearly communicated to Congress by the Comptroller who drafted Section 92, it is impossible to read the introductory language to the section in the manner suggested by petitioners and their *amici.* To do so implies that the intent of the language was to preserve powers that neither the Comptroller nor the Congress believed to exist. Rather, the only possible interpretation is that the phrase ("[i]n addition to the powers *now* vested by law") was intended to emphasize that, as of 1916, no other provision of law (including the incidental powers provision) vested any insurance agency powers in national banks. Accordingly, the court below and the Second Circuit in *ALTA v. Clarke* correctly concluded that Section 92 was intended by Congress to be the exclusive grant of insurance agency powers for national banks.

2. Fundamental principles derived from the historical jurisprudence on national bank powers should guide the Court's determination of the proper scope of the incidental powers of national banks. That jurisprudence demonstrates that the incidental powers provision of 12 U.S.C. § 24 Seventh does not restrict national banks to the business of banking as it existed in the nineteenth century. On the other hand, the jurisprudence also demonstrates that the provision does not permit national banks to engage in business or commercial activities that have not been authorized by Congress merely because they may have some nexus to the "business of banking."

Between these two extremes, there is an intermediate view that not only harmonizes and explains the 130-year jurisprudence in this area, but provides a principled approach to the incidental powers provision that would provide national banks with the flexibility to meet the needs of the modern era in performing the very old "business of banking." This analysis was presented in Professor Edward L. Symons' insightful article, *The "Business of Banking" in Historical Perspective,* 51 Geo. Wash. L. Rev. 676 (1983). While all of the briefs filed by petitioners and their *amici* cite Professor Symons' article for various propositions, none of them discusses the fundamental principles he derives from his comprehensive analysis of the statute and case law.

As discussed in Part II below, a review of the relevant jurisprudence demonstrates that the courts have upheld activities as incidental to "the business of banking" when the activity (1) is a form of, or functionally equivalent to, deposit taking, credit granting, or credit exchanging activities (*i.e.,* activities that constitute the "business of banking,") or is reasonably necessary to enable banks to perform those activities more efficiently or effectively, and (2) does not expose banks to risks of a non-banking nature, such as those of a commercial business enterprise. On the other hand, activities that do not meet these standards have consistently been rejected by the courts.

ALTA submits that this is the standard that should be applied by the Court in determining the proper scope of the incidental powers of national banks.

3. In addition to the Fifth Circuit's decision on annuities, federal appellate courts have addressed the insurance agency powers of national banks in three other contexts. In *Saxon v. Georgia Ass'n of Indep. Ins. Agents,* 399 F.2d 1010 (5th Cir. 1968), the court held that Section 92 precluded national banks in places with a population over 5,000 from engaging in the insurance agency business in connection with automobile, home-

owners, and other forms of property and casualty insurance issued in connection with loans made by the bank. In *ALTA v. Clarke*, the Second Circuit reached the same conclusions with respect to title insurance. However, in *Heimann*, the D.C. Circuit concluded that Section 92 did not prohibit national banks from selling credit-related forms of insurance, such as credit life insurance, to their borrowers.[4]

Petitioners' *amici* are concerned that if the Court concludes that Section 92 limits the insurance agency activities of national banks, as the Fifth and Second Circuits have found, the continued ability of national banks to sell credit-related forms of insurance without express Congressional authorization would be jeopardized. However, in upholding the analysis of Section 92 reached by the Fifth and Second Circuits, the Court does not necessarily have to overturn the conclusions of the D.C. Circuit in *Heimann*.

There are fundamental and unique characteristics of credit life insurance and its use by banks that do not pertain to other kinds of insurance, such as automobile, homeowners, and title insurance, that may be purchased in connection with loan transactions, or to annuities. Credit life insurance is sold only in credit transactions; it exists solely to protect credit grantors and would not be available unless credit grantors sold it; national banks were almost universally involved in the sale of such insurance at the time of the *Heimann* decision; and the bank, in performing the ministerial activities of enrolling borrowers in its credit life insurance program, does not

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[4] Credit-related insurance provides that the insurer will pay to the bank, in whole or in part, the outstanding balance of the loan in the event the borrower dies (credit life insurance), becomes disabled (credit disability insurance), is seriously injured in an accident (credit accident insurance), or becomes unemployed (involuntary unemployment insurance). For convenience, the various forms of credit-related insurance will be collectively referred to as "credit life insurance."

undertake the functions and activities normally performed by an insurance agent.

These characteristics were identified by the Comptroller in promulgating the credit life insurance regulations that were at issue in *Heimann*. They explain why the D.C. Circuit concluded that credit life insurance was "unlike other forms of insurance," 613 F.2d at 1170, and why the Second Circuit concluded that the credit life insurance precedent was not relevant to deciding whether Section 92 limited the title insurance agency activities of national banks. *ALTA v. Clarke*, 968 F.2d at 270.

Accordingly, in addressing the incidental to banking and Section 92 issues in this case, the Court should recognize the limited relevance of the credit life insurance precedent. There is ample reason and basis to distinguish the sale of credit-related insurance from the agency activities involved in other kinds of insurance products, such as those at issue in *Saxon*, in *ALTA v. Clarke*, and in this case.

ARGUMENT

I. SECTION 92 OF THE NATIONAL BANK ACT CONSTITUTES AN IMPLIED LIMITATION ON THE INSURANCE ACTIVITIES OF NATIONAL BANKS

In support of their contention that Section 92 imposes no limitations on the insurance activities that the Comptroller may authorize for national banks under the "incidental" powers provision of 12 U.S.C. § 24 Seventh, petitioners and their *amici* lay heavy emphasis on the initial twenty words of the provision ("In addition to the powers now vested by law in national banking associations under the laws of the United States . . . .").[5] The NationsBank Petitioners contend that the initial three words "conclusively demonstrate[]" that Section 92 was not intended as

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[5] *See* Federal Petitioners Br. at 39-40; NationsBank Petitioners Br. at 37-40; ABA Br. at 7-10; New York Clearing House Association Br. at 27-28; Conference of State Bank Supervisors Br. at 24-25.

a limitation on insurance activities that fall within the incidental powers clause, NationsBank Petitioners Br. at 37, and the Federal Petitioners suggest that this language can only mean that those lawful powers of national banks that "pre-date" Section 92 were intended by Congress to "survive" Section 92. Federal Petitioners Br. at 40.

If, at the time Section 92 was enacted in 1916, the Comptroller had previously determined that national banks could engage in certain kinds of insurance agency activities under Section 24 Seventh, and Congress was aware of that determination, petitioners' interpretation of the "in addition to" language would be compelling. Indeed, the "in addition to" language would have been needed so as to avoid any negative implication that the new powers for small town banks were intended to be in derogation of those insurance powers that the Comptroller had previously determined were enjoyed by all national banks under Section 24 Seventh.

Ultimately, it is Congress' understanding of what it was enacting that must guide the interpretation of this language. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982).[6] In discerning this understanding, the Court " 'necessarily attach[es] 'great weight' to agency representations to Congress' " when the agency drafted the provision at issue and made its views directly known to the Congress. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 788 (1985) (quoting from *United States v. Vogel Fertilizer Corp.*, 455 U.S. 16, 31 (1982), in turn quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). The Court has repeatedly emphasized the importance of the contemporaneous views expressed to Congress by an

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[6] *See also Platt v. Union Pac. R.R.*, 99 U.S. 48, 64 (1879) ("[I]n endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.").

agency that has drafted or participated in the drafting of legislation in determining Congress' understanding of what it was enacting. *See Selective Serv. Sys. v. Minnesota Public Interest Research Group,* 468 U.S. 841, 850 (1984); *Miller v. Youakim,* 440 U.S. 125, 144 (1979); *United States v. American Trucking Ass'ns,* 310 U.S. 534, 549 (1940). *See also* 2A N. Singer, *Sutherland Stat. Const.* § 49.04 (5th ed. 1992) ("[L]egislative history in the form of information as to how draftsmen of a provision understood it and that their meaning was communicated to the Congress which enacted it has been held to be entitled to greater weight than subsequent administrative interpretation.").

The legislative history of Section 92, while sparse, is clear and compelling that the "in addition to" language must be given precisely the opposite reading from that proffered by the NationsBank Petitioners and their *amici.*

In June of 1916, while the Senate was considering a banking bill previously passed by the House, Comptroller of the Currency Williams wrote to the chairmen of the Senate and House banking committees enclosing draft legislation that would grant insurance agency powers to national banks located in towns with a population of 3,000 or less. 53 Cong. Rec. 11,001 (1916); App. 1a-5a. In explaining the need for such legislation, the Comptroller told the Congress that under existing laws (specifically referring to the incidental powers provision), "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies . . . . It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." App. at 3a.[7]

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[7] Earlier in 1916 the Federal Reserve Board had published a memorandum regarding the authority of national banks to engage in insurance agency activities. 2 Fed. Res. Bull. 73-74 (Feb. 1916). That memorandum likewise concluded that a national bank had no

The Comptroller explained that he had been giving consideration to how small national banks might better compete with state banks and trust companies, which are sometimes authorized to do "a class of business not strictly that of commercial banking." App. at 2a. In discussing the reasons for limiting the grant of such authority to banks in small communities, he concluded that:

> I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

App. at 4a.

After receiving the letter, Senator Owen, the chairman of the Senate Banking Committee, indicated that he would offer the amendment recommended by Comptroller Williams, which he described as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,153 (1916). Chairman Owen later introduced the language of the amendment, which he described to his colleagues as having been "reported upon favorably by the Comptroller of the Currency, giving certain limited rights of agency to national banks." *Id.* He noted that while the Comptroller had recommended limiting the provision to communities with a population of 3,000 or less, he was amenable to increasing the popula-

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express power to engage in such activities and that no such authority could be derived from the incidental powers of national banks under 12 U.S.C. § 24 Seventh. According to the memorandum, "[a]ny such extension of the powers of national banks must be left to the considerations of Congress." 2 Fed. Res. Bull. at 74.

tion limit to 5,000. The amendment, as modified, was then adopted by the Senate and subsequently incorporated without change into the conference committee report on the overall bill.[8]

Thus, the Comptroller who drafted Section 92 and upon whose recommendation the provision was enacted was clear and unequivocal in his views that (a) national banks had neither the express nor the incidental power to engage in the business of being an insurance agent, (b) the Comptroller "has no right to authorize or permit a national bank to exercise powers not conferred upon it by law," App. at 3a, and (c) it would be "unwise and therefore undesirable" to confer insurance agency powers on national banks generally. App. at 4a.[9] Moreover, there is not a scintilla of evidence that anyone in Congress disagreed with these views. What, then, did Comptroller Williams—and the Congress—intend by the introductory language to Section 92?

The one intention that cannot be attributed to them is to preserve some purported insurance agency powers of national banks under Section 24 Seventh. In light of the Comptroller's letter to Congress, it is totally unreasonable, indeed absurd, to read the "in addition to" language as

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[8] *Id.* at 13,259-61 (Senate); *id.* at 13,354-56 (House). There was no further discussion of the insurance provision in the Senate or House.

[9] The fact that, in the 50 years between the enactment of Section 24 Seventh and the enactment of Section 92, the Comptroller had never concluded that the incidental powers provision constituted a congressional grant of insurance agency authority to national banks should be significant in determining whether such power was actually conferred by Section 24 Seventh. *See Bank-America Corp. v. United States*, 462 U.S. 122, 131 (1983) (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)) ("just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred").

reflecting Comptroller Williams'—or the Congress'—intention to preserve incidental powers for national banks that the Comptroller had so clearly concluded did not exist.

Similarly, there is no basis for reading the "in addition to" language as having been intended to preserve insurance agency powers that future Comptrollers of the Currency might authorize. Any such intent is clearly belied by Comptroller Williams' view that the Comptroller had no authority under Section 24 Seventh to authorize insurance agency activities under that section. More importantly, the relevant language of Section 92 is "[i]n addition to the powers *now* vested by law" in national banks (emphasis supplied). "Now" was September 17, 1916, the date of enactment of Section 92. It is indisputable that the Comptroller who drafted this language, and the Congress that enacted it, believed that in 1916 national banks were "*then*" not vested by law with any power to act as insurance agents. Thus, the inclusion of the word "now" absolutely forecloses any argument that it was the intent of Congress, in enacting this language, to preserve the grant of insurance agency powers by future Comptrollers under Section 24 Seventh.

In light of the legislative history, the only possible interpretation of the "in addition to the powers now vested by law" language is that the Comptroller and the Congress were intending to make clear that the limited insurance agency powers granted by Section 92 were the sole insurance agency powers authorized for national banks. Indeed, the "in addition to" language supplies compelling support for the application of the "*expressio unius*" principle by the Fifth Circuit below and by the Second Circuit in *ALTA v. Clarke.*[10]

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[10] "*Expressio unius est exclusio alterius*" is a maxim of statutory construction that is translated as "the mention of one thing implies the exclusion of another." *See VALIC*, 998 F.2d at 1298.

In the *VALIC* and *ALTA v. Clarke* decisions, the courts applied the *expressio unius* principle to hold that the explicit and limited

In sum, Congress demarcated the insurance agency powers of national banks in 1916 and any expansion or modification of those powers must come from Congress.

II. PETITIONERS' VIEW OF THE "INCIDENTAL" POWERS OF NATIONAL BANKS IS ERRONEOUS

Since 1864 the National Bank Act, 12 U.S.C. § 24 Seventh, has provided that a national bank may exercise "all such incidental powers as shall be necessary to carry on the business of banking." Petitioners seek to present the Court with a choice between two possible interpretations of the provision. Either the provision conveys a broad grant of authority with the attendant broad delegation of administrative discretion to the Comptroller (as petitioners contend), or the provision represents a static grant of powers that is unable to keep pace with the changing demands and the increased sophistication of the business of banking.[11]

In fact, neither alternative is consistent with the principles derived from Supreme Court and federal appellate court jurisprudence on the incidental powers of national banks. As this jurisprudence demonstrates, the incidental powers provision does not mean that national banks are limited only to those activities that characterized the business of banking as it existed in the nineteenth century. Nor, however, does it mean that national banks have the authority (in the absence of an express statutory grant) to engage in any commercial or business activity that the Comptroller believes has some nexus to banking or to an express power of banks.

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grant of insurance agency powers under Section 92 precluded subsequent administrative determinations of insurance agency powers under Section 24 Seventh. This was a proper application of the principle because it was based on, and totally consistent with, extrinsic evidence of the intent of the drafters of Section 92.

[11] *See, e.g.*, Federal Petitioners Br. at 16-20; NationsBank Petitioners Br. at 26-30.

Between these two extremes, there is an intermediate view of the incidental powers provision—one that explains and harmonizes the judicial precedent in this area and is consistent with a safe and modern banking system.[12] A review of that precedent demonstrates that the courts have upheld activities as "incidental" to "the business of banking" when the activity (1) is a form of, or functionally equivalent to, deposit taking, credit granting, or credit exchanging activities (*i.e.*, activities that constitute the "business of banking,") or is reasonably necessary to enable banks to perform those activities more efficiently or effectively, and (2) does not expose banks to risks of a non-banking nature, such as those of a commercial business enterprise.

From the time of the enactment of the National Bank Act, Supreme Court decisions have upheld activities of national banks as within their incidental powers when such activities fell within these "business of banking" standards. These decisions include:

- *Merchants' Nat'l Bank* v. *State Bank,* 77 U.S. (10 Wall.) 604, 647 (1871) (power to certify checks; functionally equivalent to accepting checks);
- *First Nat'l Bank v. National Exch. Bank,* 92 U.S. 122, 127-28 (1876) (power to acquire stock in compromise of debt owed to the bank as reasonably necessary to effectuate power to make loans; but bank may not engage in business of buying or selling stocks for profit);
- *Union National Bank v. Matthews,* 98 U.S. 621 (1879) (power to foreclose on a deed of trust given

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[12] The analysis that follows is derived in substantial measure from Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective,* 51 Geo. Wash. L. Rev. 676 (1983). Remarkably, petitioners and all of their *amici* cite Professor Symons' article for other propositions, but fail to draw the Court's attention to the fundamental insights Professor Symons derives from the relevant jurisprudence regarding the proper interpretation of the incidental powers clause.

by a third party and pledged to bank to secure a loan from the bank);

- *Wyman v. Wallace,* 201 U.S. 230, 243 (1906) (power to borrow money to repay depositors: "[The bank] is not borrowing money to engage in new business. It simply exchanges one creditor for others");

- *Miller v. King,* 223 U.S. 505, 510 (1912) (power to act as trustee for collection of a debt and to sue for recovery of that debt; such activity being functionally equivalent to a bank's traditional business of taking title to a negotiable instrument endorsed to it for purposes of collection);

- *Clement Nat'l Bank v. Vermont,* 231 U.S. 120, 139-40 (1913) (power to execute agreement with state to implement state law permitting banks, on behalf of their depositors, to pay tax imposed on the interest paid on such deposits; agreement was directly related to the business of deposit taking);

- *First Nat'l Bank v. Hartford,* 273 U.S. 548, 559-60 (1927) (power to sell mortgages and other debt instruments acquired by loan or discount);

- *Colorado Nat'l Bank v. Bedford,* 310 U.S. 41, 49 (1940) (power to conduct a safe deposit business; functionally equivalent to express power under 12 U.S.C. § 133 to accept special deposits); and

- *Franklin Nat'l Bank v. New York,* 347 U.S. 373, 377-78 (1954) (power to use the word "savings" in advertising the bank's authorized business).

Recent decisions of federal appellate courts upholding activities of national banks as within their incidental powers likewise reflect the above-described "business of banking" standards. *See, e.g., First Nat'l Bank v. Taylor,* 907 F.2d 775 (8th Cir.) (power to issue debt cancellation contracts to borrowers under which the borrower's debt is extinguished in the event of death), *cert. denied,* 498 U.S. 972 (1990); *Securities Indus. Ass'n v. Clarke,*

885 F.2d 1034 (2d Cir. 1989) (power to sell mortgage pass-through certificates as a mechanism for the sale of the bank's mortgage loans), *cert. denied,* 493 U.S. 1070 (1990); *American Ins. Ass'n v. Clarke,* 865 F.2d 278, 282 (D.C. Cir. 1989) (upholding the issuance of standby credits to insure municipal bonds as essentially constituting "the issuance of a standby letter of credit, a device long recognized as within the business of banking"); *M & M Leasing Corp. v. Seattle First Nat'l Bank,* 563 F.2d 1377, 1380 (9th Cir. 1977) (authorizing bank to engage in the leasing of personal property "when, in the light of all relevant circumstances, the transactions constitute the loan of money secured by the properties leased"), *cert. denied,* 436 U.S. 956 (1978).

On the other hand, the courts have repeatedly rejected activities as not being incidental to banking where the activity did not fall within the "business of banking" standards identified above or otherwise exposed the bank to risks beyond those entailed in its deposit taking, credit granting, and credit exchanging activities. *See, e.g., Merchants' Nat'l Bank v. Wehrmann,* 202 U.S. 295 (1906) (denying power of bank to become a partner in a business that would expose it to unlimited liability); *First Nat'l Bank v. Converse,* 200 U.S. 425 (1906) (denying power to become an organizer and stockholder in a new venture even if the bank had previously lent money to a predecessor company); *California Nat'l Bank v. Kennedy,* 167 U.S. 362 (1897) (denying power to acquire stock in another corporation except as security for or in compromise of a debt); *M & M Leasing Corp.,* 563 F.2d at 1383-84 (denying power to engage in automobile lease transactions that would involve the bank in more than traditional credit risk exposure, or to provide "operational services such as repairs, maintenance, spare parts, *insurance coverage,* license renewals . . . [because] such services are not those of a bank") (emphasis added) (footnote omitted); *National Retailers Corp. v. Valley Nat'l Bank,* 604 F.2d 32 (9th Cir. 1979) (*per curiam*)

(denying power to offer data processing services to parties other than the bank itself); *Arnold Tours, Inc. v. Camp,* 472 F.2d 427 (1st Cir. 1972) (denying power to operate a travel agency).

In an attempt to sidestep this historical framework, petitioners misconstrue the "convenient or useful" standard first articulated in *Arnold Tours,* 472 F.2d at 432 (an activity is incidental if it is "convenient or useful" in connection with the performance of an express power). The "convenient or useful" language used by the First Circuit was intended to summarize in a few words the principles to be derived from its analysis of the prior Supreme Court and lower court jurisprudence discussed above. *Id.* at 431-32. The principles the *Arnold Tours* court sought to encapsulize in the "convenient or useful" standard are the same principles that have been identified in Professor Symons' article, and that ALTA believes should be applied by this Court.

Stripped from the context in which it must be viewed—the historical jurisprudence on the activities of national banks—the phrase "convenient or useful" can easily be misunderstood as sanctioning any commercial or business activity that has some nexus of "convenience" or "usefulness" to banking or a bank's express powers. Judicial decisions that have applied the "convenient or useful" standard have not, in fact, sanctioned such broad-ranging activities.[13] Rather, consistent with Professor Symons' analysis they have not permitted banks to engage in new business activities unless the activity was functionally equivalent to or involved the same risks as deposit taking, credit granting, or credit exchanging, or was reasonably necessary to enable those powers to be exercised effectively. This analysis of the incidental powers provision is faithful to the principle that new substantive powers

[13] *See, e.g., Securities Indus. Ass'n v. Clarke,* 885 F.2d 1034; *American Ins. Ass'n v. Clarke,* 865 F.2d 278; *National Retailers Corp.,* 604 F.2d 32; *M & M Leasing Corp.,* 563 F.2d 1377.

for national banks should be established by Congress and provides a reasoned, consistent approach to "permit[ting] the use of new ways of conducting the very old business of banking." *M & M Leasing Corp.*, 563 F.2d at 1382. It is the analysis that should guide this Court's resolution of the incidental powers issue.

III. AFFIRMANCE OF THE DECISION BELOW WILL NOT JEOPARDIZE THE ABILITY OF NATIONAL BANKS TO CONTINUE TO ENGAGE IN CREDIT-RELATED INSURANCE ACTIVITIES THAT HAVE BEEN UPHELD BY THE COURTS

Petitioners' *amici* point out that for many years national banks have engaged in the sale of certain credit-related products (most prominently credit life and credit disability insurance) that are generally considered to be insurance and that the sale of such products has been upheld by the courts.[14] The implication is that a decision by the Court that Section 92 restricts the authority of national banks to act as insurance agents in places with a population in excess of 5,000 may jeopardize the continued ability of national banks to engage in these activities.[15]

The nub of the issue is how to reconcile the conclusion of the D.C. Circuit in *Heimann*, that Section 92 does not limit the sale of credit life insurance by national banks, with the conclusions in the Fifth Circuit's decisions in *VALIC* and *Saxon*, and in the Second Circuit's decision in *ALTA v. Clarke*—that Section 92 limits the powers of national banks to sell annuities, and to act as agents

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[14] New York Clearing House Association Br. at 2-3; ABA Br. at 14.

[15] This concern was highlighted by the NationsBank Petitioners. *See* NationsBank Petition for Writ of Certiorari at 27 ("If the expansive and unsupportable interpretation given *Saxon* by the court of appeals stands, then all of the national bank insurance activities regarding the specialized insurance-related products discussed above would be subject to challenge.").

in the sale of property and casualty insurance, and title insurance. While credit life insurance is not at issue in this case, the Court should appreciate why a decision affirming the conclusions reached by the Fifth and Second Circuits regarding the scope and meaning of Section 92 would not necessarily have to apply to the credit-related insurance activities that were approved in *Heimann.*[16]

The *Heimann* decision involved regulations promulgated by the Comptroller to curb self-dealing by bank insiders who were personally profiting from the sale of credit life insurance to bank customers and to permit the banks themselves to obtain commissions from the sale of such insurance[17] In promulgating these regulations, the Comptroller identified certain salient characteristics of credit life insurance and national bank involvement in the sale of credit life insurance that had led him to approve the activity for all national banks.[18] These factors included:

- credit life insurance is issued only in connection with credit transactions, exists solely for the pro-

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[16] The alleged conflict between the Second Circuit's decision on title insurance and the *Heimann* decision on credit life insurance was also a principal ground on which the Federal Petitioners and Chase Manhattan had sought review in the ALTA case. In opposing the petitions for writs of certiorari, ALTA addressed at length the unique factors regarding bank involvement in the sale of credit life insurance that are discussed below and the reasons why such factors were completely inapposite in the context of title insurance. *See* Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 11-16, Nos. 92-482, 92-645 (filed Nov. 12, 1992).

[17] These regulations are presently codified at 12 C.F.R. §§ 2.1-2.7 (1994). The regulations define "credit life insurance" as including "credit life, health, and accident insurance." 12 C.F.R. § 2.3 (1994).

[18] The rulemaking notices in which these factors were discussed are *Disposition of Credit Life Insurance Income* (Final Regulation), 42 Fed. Reg. 48,518 (1977) (hereafter "Final Rulemaking") and *Disposition of Credit Life Insurance Income* (Proposed Rulemaking), 41 Fed. Reg. 29,846 (1976) (hereafter "Proposed Rulemaking").

tection of credit grantors, and "has no appeal whatsoever to persons not simultaneously borrowing from the bank;" [19]

- credit life insurance is the functional substitute for provisions that might otherwise be included in the loan agreement to provide additional security to the lender for the repayment of the loan; [20]
- credit life insurance would not be available for the protection of creditors unless credit grantors, such as national banks, sold the insurance; [21]
- national banks were almost universally involved in the sale of credit life insurance at the time of the Comptroller's credit life rulemaking; [22] and
- unlike the work performed by agents for other types of insurance, a bank that sells credit life insurance performs only *de minimis* clerical work in enrolling borrowers in the credit life program.[23]

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[19] Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3.

[20] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2 (Section 92 was not intended to limit the ability of national banks "to provide, in connection with a credit transaction, a peculiarly special type of insurance which could serve the same purpose as additional collateral, a co-maker, or a guarantor.").

[21] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2 (credit life insurance is "peculiarly related to the business of banking and not generally available from insurance agencies unaffiliated with financial institutions"); *id.* at col. 3 n.3 ("Congress recognized that creditors are virtually the only source of credit life insurance").

[22] *See* Proposed Rulemaking, 41 Fed. Reg. at 29,847 col. 1 (Comptroller's conclusion influenced by the widespread availability of credit life insurance at commercial banks throughout the United States) & n.1 thereto (survey by national bank examiners of 2,900 national banks indicated that fewer than 20 were *not* providing credit life insurance) (emphasis supplied).

[23] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3 (banks engaged in selling credit life insurance do not engage in risk investigation or evaluation or other functions typically performed by an independent insurance agent); *id.* at 48,521 col. 3 ("the

In light of these factors, it is understandable why the D.C. Circuit concluded that credit life insurance is "[u]nlike other forms of insurance" and is a "limited special type of coverage written to protect loans," *Heimann*, 613 F.2d at 1170. They also explain why the Second Circuit concluded that its determination on title insurance was not inconsistent with the D.C. Circuit's conclusions regarding the credit life insurance powers of national banks. *See ALTA v. Clarke*, 968 F.2d at 270.

While these factors characterize credit life insurance and the other types of credit-related insurance, they do not pertain in any way to the types of insurance activities that were at issue in *Saxon* (homeowners and automobile insurance), in *ALTA v. Clarke* (title insurance), or to the sale of annuities.

In sum, the lower courts have appropriately recognized that national bank sale of credit-related insurance should be differentiated from the sale by national banks of other kinds of insurance products, such as automobile, homeowners, and title insurance. ALTA believes that the court below properly concluded that the sale of annuities is embraced within the limitations of Section 92. If, however, the Court should reach a contrary conclusion, we urge it to be mindful of the careful and proper balance that the lower courts have struck with regard to the various types of insurance and to avoid inadvertently upsetting

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administrative cost of producing credit life insurance income is close to negligible"). *See also Commissioner v. First Sec. Bank*, 405 U.S. 394, 397 (1972) ("The cost to each of the Banks for the actual time devoted to explaining and processing the [credit life] insurance was less than $2,000 per year, characterized by the courts below as 'negligible.' ").

Indeed, one could well conclude that the ministerial role a bank plays in the sale of credit life insurance should not be considered to be that of an insurance agent within the meaning of Section 92. *See First Nat'l Bank v. Smith*, 436 F. Supp. 824, 831-33 (S.D. Tex. 1977), *modified*, 610 F.2d 1258, 1262 (5th Cir. 1980) (discussion of Section 92 vacated as unnecessary to resolution of case).

that balance through language in its opinion that might suggest a broader ruling than the Court intends. Just as petitioners' *amici* are concerned that a decision upholding the court below not cast doubt on the continued power of national banks to sell credit-related insurance, ALTA is concerned that a decision reversing the court below not inadvertently cast doubt on the Second Circuit's determination regarding title insurance.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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September 8, 1994

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APPENDIX

LETTER FROM COMPTROLLER WILLIAMS
53 Cong. Rec. 11,001 (1916)

Treasury Department,
Comptroller of The Currency,
Washington, June 8, 1916.

My Dear Senator:

The original national-bank act of February 25, 1863, as reenacted by the act of June 3, 1864, authorizing the formation of national banks throughout the country, provided that no national bank should be authorized with a capital of less than $50,000 in any place; that in a place with a population exceeding 6,000 the capital of the bank should not be less than $100,000, and further provided that no national bank with a capital of less than $200,000 should be organized in any place having a population of over 50,000.

Later on it became manifest that there were many country towns and villages which needed banking facilities but which did not have sufficient business to justify the organization of national banks with a capital of as much as $50,000. To extend the benefits of banking facilities to these small places the national-bank act was amended by the act of March 14, 1900, so as to authorize the organization in towns and villages with a population not exceeding 3,000 of banks with a minimum capital of $25,000.

Since this amendment to the bank act went into effect there have been organized throughout the country 3,084 national banks having a capital of $25,000. Four hundred and thirty-eight of these $25,000 banks have either failed or gone into liquidation, some have increased their capital, and the number of such banks with a capital of $25,000 now in operation is 2,079, or 27 per cent of the total number of national banks.

The average deposits (individual and bank) at this time of all $25,000 banks is $178,138, or 7.13 times their capital and 4.6 times their capital, surplus, and profits. A country bank with $25,000 capital and with the average deposits is able, with good management, to lend its money at rates authorized by law and at the same time to return a reasonable dividend to its shareholders. But there are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers. It is unfortunately true that in many other cases banks have been demanding usurious rates of interest even though they had more than the average deposits and although adherence to the legal rates would still yield them liberal dividends on their shares.

For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Under Section 5736, United States Revised Statutes, the business of national banks at this time is limited to the exercise of "such incidental powers as shall be necessary to carry on the business of banking by (a) discounting and negotiating promissory notes, drafts, bills of exchange or other evidences of debt; (b) receiving deposits; (c) buying and selling exchange, coin, and bullion; (d) loaning money on personal security; (e) obtaining, issuing, and circulating notes according to the provisions of this title."

Under the Federal reserve act the banks are further authorized under specified restrictions to make certain loans on real estate.

National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies or as brokers or agents for others in procuring or making real estate loans.

The courts have uniformly held that such corporations can exercise only those powers which are expressly granted or which are necessarily incidental to powers that are granted.

As stated by Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court in the case of Logan County National Bank v. Townsend (139 U.S., 67):

"It is undoutbedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

Again in the case of National Bank v. Matthews (98 U.S., 625), Mr. Justice Swan, in delivering the opinion of the court, said:

"Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed."

It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law.

My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in villages and towns hav-

ing a population of not exceeding 3,000 may be permitted to act as agents for insurance companies in the placing of policies of insurance—fire, life, etc.—and that they may also be authorized to act as agents for the negotiation of loans on farms or other real estate in their respective sections of the country, where they may be in position to have some direct knowledge as to the value of the property upon which such loans are to be secured.

It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to assume such proportions as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written or mortgages to be placed on commission is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

I inclose with this a draft of a proposed amendment to the national-banking act designed to empower national banks located in towns of not over 3,000 population, under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller

of the Currency, to act as agents for the placing of insurance policies and also to act as agent in making or procuring loans on real estate.

I respectfully recommend and urge the adoption of such an amendment for the reasons I have given.

I am to-day writing a letter similar to this to Congressman Glass, chairman of the Banking and Currency Committee of the House of Representatives.

Respectfully,

Jno. Skelton Williams,
Comptroller.

Hon. Robert L. Owen,
United States Senate.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,
v.
VARIABLE ANNUITY LIFE INSURANCE COMPANY,
Respondent.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,
v.
VARIABLE ANNUITY LIFE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, AND INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the *Chevron* standard when it did not adopt the Comptroller's new construction of 12 U.S.C. § 24(7) or his new determination that annuities do not constitute "insurance" for purposes of 12 U.S.C. § 92, even though the Comptroller contradicted his prior construction of those statutes. (No. 93-1612).

2. Whether 12 U.S.C. § 92, which provides that, "in addition to" their other powers, national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company," impliedly bars national banks in more populous places from brokering annuities. (No. 93-1612)

3. Whether federal law permits national banks, wherever located, to act as agents in the sale of annuities. (No. 93-1613)

4. Whether the sale of annuity contracts is "necessary to carry on the business of banking" under 12 U.S.C. § 24(7).

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INSURANCE AGENTS OF AMERICA, INC.
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICI

Amici curiae National Association of Life Underwriters, National Association of Professional Insurance Agents, and Independent Insurance Agents of America, Inc., are non-profit national trade associations that repre-

sent hundreds of thousands of insurance agents and their employees throughout the United States. Many of these agents market and sell fixed and/or variable annuities pursuant to State-issued insurance agency licenses. To the extent these agents sell annuities in North Carolina and South Carolina, they are in direct competition with petitioners, NationsBanc Securities, Inc. and NationsBank of North Carolina, N.A. (collectively "NationsBank"), which seek to sell annuities as agents for life insurance companies.

Amici have a substantial interest in the questions presented here because of their members' involvement in the sale of annuities—an important and growing part of the insurance business. *Amici*'s members are directly threatened by, and concerned with, the entry of banks like NationsBank into the marketplace for insurance. Because of their control of capital, banks necessarily have an unfair advantage in the sale of insurance that is detrimental to both independent agents and the general public. *See, e.g., Barnett Bank of Marion County, N.A. v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993) (explaining that statutory separation of banking and insurance "is for the protection of the solvency of the insurance industry, and the prevention of coercion which in turn protects all potential, present and future policyholders") (appeal pending).

Amici have long maintained that their associations' interest in sustaining and improving the business environment of those engaged in insurance, and protecting the insurance customer, is served by endorsing the separation of banking and insurance as provided under current law. In this regard, *amici* often appear as parties and as *amici curiae* in cases, such as this, raising important questions regarding the power of banks to engage in the business of insurance.

SUMMARY OF ARGUMENT

It is well-settled that national banks—such as NationsBank—are limited to those activities authorized by law. *E.g., Logan County Nat'l Bank v. Townsend,* 139 U.S. 67, 73 (1891). This Court long ago explained that "[t]he measure of their powers is the statutory grant; and powers not conferred by Congress are denied." *Texas & Pac. Ry. Co. v. Pottorff,* 291 U.S. 245, 253 (1934). Section 24 (Seventh) of the National Bank Act enumerates a series of express banking powers so authorized. It also permits a national bank to exercise "all such incidental powers as shall be necessary to carry on the business of banking . . . ." 12 U.S.C. § 24 (Seventh) (emphasis added).

An incidental power must be related to and facilitate the accomplishment of one of Section 24 (Seventh)'s enumerated powers. The "incidental" and "necessary" clause does not confer the unfettered power to engage in the undefined "business of banking." Moreover, the word "necessary" has been ignored by the Comptroller and, quite frankly, by many of the lower courts. But the teachings of this Court emphasize that it is the plain meaning of the statutory language that controls. Necessary, as used in Section 24 (Seventh), cannot mean merely convenient or useful, but rather means "reasonably required." In this case, the language requires that the Comptroller's order be reversed, because the Comptroller has not found —and could not find—that the sale of annuities is "necessary" to the functioning of a national bank.

12 U.S.C. § 92 (Supp. V 1993) ("Section 92"), which limits the sale of insurance to national banks located and doing business in towns of 5000 or less, makes clear that the sale of annuities is not "incidental" and "necessary" for national banks to conduct the business of banking.

Finally, national banks' power to engage in insurance sales cannot be premised on state-chartered banks' pur-

ported authority to do so. Most States completely prohibit or severely restrict their chartered banks from engaging in the sale of insurance products. Moreover, even if this were not the case, the scope of the powers granted to national banks cannot be determined by reference to the powers granted to state-chartered institutions.

ARGUMENT

As a practical matter, the issue presented in this case is narrow: whether every national bank may sell annuities (pursuant to Section 24 (Seventh)) or whether only those national banks located and doing business in towns not exceeding 5000 may engage in that insurance-agency activity (pursuant to Section 92). The Fifth Circuit, in the decision under review, held that national banks may sell annuities only pursuant to Section 92. In reality, this conclusion appears to impose few limitations on national banks' actions. As interpreted by the Comptroller, Section 92 permits the bank to operate out of a branch in a small town, even if its main office is in a large city, and to sell insurance (including annuities) to customers located anywhere.[1] If the Comptroller's interpretation of Section 92 is correct, presumably any national bank that is currently selling annuities (unlawfully) pursuant to Section 24 (Seventh) could simply transfer its activities to a small town branch of the bank. The dire predictions of the national banks in this case must be seen for what they are: a cry of "wolf."

The relevance of this case, however, is much broader. Especially in recent years, the Comptroller has repeatedly

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[1] *See Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). This broad interpretation is subject to pending litigation. *See Barnett Bank of Marion County, N.A. v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), appeal pending, No. 93-3508 (11th Cir.); *NBD Bank, N.A. v. Bennett*, Civ. Action No. IP 94-862-C (U.S. Dist. Ct., S.D. Indiana); *Shawmut Bank Connecticut, National Ass'n v. Googins*, Civ. 3:94CV146 (JAC) (U.S. Dist. Ct., D. Conn.).

and consistently expanded the powers of national banks to engage in non-banking activity—most relevant to *amici*, in the insurance business—purportedly pursuant to Section 24 (Seventh). The Comptroller has affirmatively encouraged national banks, adversely affected by economic forces that prompt consumers to obtain loans from non-bank sources and to place their money elsewhere, to garner revenues from non-traditional sources. Unable to obtain legislation that would permit national banks to expand into these non-banking businesses, the Comptroller has taken an aggressive administrative stance and opened the door to these activities under cover of the *Chevron* doctrine—and not without significant detriment and risk to the bank customer.[2] This case offers the Court an opportunity to instruct the Comptroller that he does not have carte blanche authority to rewrite Congress' carefully crafted legislation which, for the safety and soundness of the banking system, has long maintained the separation of banking and commerce.

I. THE LANGUAGE AND STRUCTURE OF SECTION 24 (SEVENTH) OF THE NATIONAL BANK ACT DO NOT PERMIT THE COMPTROLLER TO AUTHORIZE NATIONAL BANKS TO SELL ANNUITIES.

In granting NationsBank permission to sell annuities in the letter at issue here, the Comptroller failed even to identify the statutory language on which his authorization of annuity powers was based. There is no question, however, that Section 24 (Seventh) does *not* expressly grant

[2] In a recent survey of purchasers of non-banking products offered by banks, for example, one of the primary conclusions made by the American Association of Retired Persons and the North American Securities Administrators Association was that many bank customers incorrectly believe that the FDIC offers the same protection to mutual funds, stocks and annuities offered by banks that it offers to savings and checking accounts. These customers are convinced to purchase non-banking products from banks under a false sense of security. *See* AARP and NASAA Bank Investment Products Survey (Jan., 1994).

national banks the power to sell annuities. Thus, the only grant of power upon which the Comptroller could rely to defend his interpretation of the section as allowing national banks to sell annuities is the "incidental powers . . . necessary to carry on the business of banking" clause. But the Comptroller made no actual finding that annuity-sales powers are "incidental" and "necessary" to the business of banking.

Even now, petitioners make no attempt to articulate how the sale of annuities is "necessary" to the business of banking. Indeed, they postulate no meaningful definition of the term. The Comptroller *post hoc* states equivocally that "the term *may* mean no more than convenient or useful." Fed. Br. at 23 (emphasis added).[3] NationsBank appears to believe the term should mean "appropriate" or "reasonably conductive to the end to be accomplished," NationsBank Br. at 21, although it does not explain how the sale of annuities fits into even this overly broad definition. In the end, the Comptroller is reduced to asserting that necessary means whatever he says it means. Fed. Br. at 21-22.

Necessary must, however, have *some* meaning. And because no party has argued that selling annuities is reasonably "required" or "essential" to the business of banking, the only issue to be resolved is whether "necessary" can be read so broadly as to be unrecognizable—to mean not essential or needed or even reasonably required, but instead to mean merely "convenient" or "expedient." As demonstrated below, no plausible interpretation of the word necessary, whether that term is read alone or in the context of banking law generally, includes such a broad, tortured definition.

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[3] This *post hoc* rationalization of the agency's action is entitled to no deference. *E.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

A. The Comptroller's Interpretation Is Foreclosed by the Plain Language of the Statute.

"In cases of statutory construction we begin, of course, with the language of the statute." *Diamond v. Chakrabarty,* 447 U.S. 303, 307 (1980) (citation omitted). In construing that language, "[a] fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979) (citation omitted). Thus, in determining the meaning of the term "necessary," "we look to the ordinary meaning of the term . . . at the time Congress enacted the statute" in 1863. *Id.* at 42; *see also MCI Telecommunications Corp. v. American Telephone & Telegraph Corp.,* 114 S.Ct. 2223, 2230 (1994) ("the most relevant time for determining a statutory term's meaning" is when the statute was passed).

"Necessary" has a plain, ordinary, unambiguous meaning: it means "reasonably required," "needed," or "essential." A review of dictionaries in existence during the mid and late 1800s reveals that this was the understanding of the word "necessary" at the time the statute was enacted; indeed many dictionaries defined necessary in an even more restrictive manner. *See, e.g.,* The Universal English Dictionary 216 (1861). ("Indispensably requisite; that cannot be otherwise; needful; conclusive; decisive by inevitable consequence; unavoidable"); A Popular and Complete English Modern Dictionary 870 (1850) ("That must be; that cannot be otherwise, indispensably requisite. Indispensable; requisite; essential; that cannot be otherwise without preventing the purpose intended. Unavoidable."); The American Standard Dictionary of the English Language (1815) ("needful, unavoidable"). Modern dictionary definitions confirm this common-sense understanding of the word. *See, e.g., The Oxford English Dictionary* 275 (1989) ("Indispensable, requisite, essential, needful; that cannot be done without."); Webster's Collegiate Dic-

tionary 790 (9th Ed. 1984) ("Of an inevitable nature: inescapable.").[4]

No dictionary reviewed in existence when the statute was enacted defined necessary as "convenient" or "useful."[5] Thus, it is not surprising that this Court has expressly rejected the definition petitioners proffer. As the Court held, "[a] practice is not within the incidental powers of a [national bank] merely because it is convenient in the performance of an express power." *Texas Pac. Ry. Co. v. Pottorff*, 291 U.S. at 255 n.7.

The plain, unambiguous meaning of the word "necessary" has been recognized by other courts when interpreting the word in the context of other statutes.[6] In *Sunshine Mining v. United States,* 827 F.2d 1404 (9th Cir. 1987), for example, the Ninth Circuit recognized that a "necessary" process is one that is "essential." *Id.* at 1408 (interpreting 26 U.S.C. § 613(c)(2)). Similarly, in *Morrison-Knudsen v. CHG Int'l,* 811 F.2d 1209 (9th Cir. 1987), *cert. dismissed*, 488 U.S. 935 (1988), the court recognized that the FSLIC could not appropriate more power than was expressly granted to it merely by pointing to statutory language allowing it "to do all other things that may be necessary in connection" with its business.

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[4] Petitioners point to only one, contemporary, dictionary definition in which necessary is defined as either "convenient" or "useful" or "inevitable" or "indispensable." That dictionary, however, did not exist at the time the Congress drafted what is now Section 24 (Seventh). Moreover, the existence of "one dictionary whose suggested meaning contradicts virtually all others" is not sufficient to establish that a phrase is ambiguous. *MCI Telecommunications Corp. v. American Telephone & Telegraph,* 114 S.Ct. 2223, 2229 (1994). Instead, the commonly accepted meaning is the one that courts should attribute to the word in question. *Id.*

[5] Indeed, petitioners' briefs notably fail to cite a single definition from a dictionary in existence when the statute was passed.

[6] *See Pierce v. Underwood,* 487 U.S. 552, 563-67 (1988) (using interpretations of similar language in other statutes to decide which of two meanings to give to relevant language).

The agency, the Court noted, was "seek[ing] to burden a word, in this case 'necessary,' with more weight than it reasonably can carry". *Id.* at 1218-19 (interpreting 12 U.S.C. §1729(d)).[7]

B. The Proper Interpretation of the Term "Necessary" Is Confirmed When Read in the Context of Section 24 (Seventh) and the Banking Laws as a Whole.

Reading Section 24 (Seventh) as a whole confirms that necessary means "reasonably required," not merely "convenient" or "useful." Section 24 (Seventh) contains a grant of express powers and also contains a grant of those powers reasonably required—necessary—to effectuate those authorized activities. Petitioners would not only rewrite the definition of necessary but would also ignore the phrase immediately following it: "to carry on the business of banking." Although it might be convenient or useful for banks to offer annuities—it allows them an additional revenue-raising opportunity and provides a service their customers may want—selling annuities does not further the business of banking, as that phrase is properly understood. That is, selling annuities does not further the bank's ability to perform an express bank power, such as deposit taking, credit granting or credit exchanging.[8] And it certainly cannot be said that national banks *reasonably*

[7] NationsBank's attempt to draw meaning from the term "necessary" as used in the "Necessary and Proper" clause of Article I of the U.S. Constitution, NationsBank Br. at 22, is misguided. First, unlike statutory provisions, constitutional implied powers are construed generously. *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972). Second, the term as used in Section 24 (Seventh) is directly tied to specific enumerated banking powers.

[8] That the sale of annuities must relate to one of national banks' enumerated powers was made clear in the New York Court of Appeals' seminal decision in *Curtis v. Leavitt*, 15 N.Y. 2 (1857), interpreting the incidental powers clause of the New York law on which Section 24 (Seventh) was based. The *Curtis* court held that an "incidental" power must be directly related to the exercise of *specified* powers, as well as necessary and useful to give them effect. *Id.* at 157-58.

require the power to sell annuities in order to engage in banking; banks have been effectively engaging in banking since the passage of the statute despite their historic inability to sell annuities.

That necessary means reasonably required or needed is clear when the word is viewed in isolation, clearer when it is read in the context of Section 24 (Seventh) as a whole, and clearer still when read in conjunction with other banking statutes. When Congress wanted to grant financial institutions the ability to exercise all incidental powers that would be convenient or useful—instead of reasonably required or needed—it did so expressly. Throughout banking law, Congress has conferred certain incidental powers that are either necessary *or expedient* to the business of banking.[9] It is therefore clear that Congress, according words their ordinary meaning, does not view the terms necessary and expedient as coextensive. And Congress' failure to include "expedient" or "convenient" language in Section 24 (Seventh) indicates that the only power granted in that section is the incidental power that is "necessary"—reasonably required—and *not* merely expedient or convenient, to the business of banking. *See Russello v. United States*, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("'[W]here Congress includes particular language in one section . . . but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

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[9] *See, e.g.*, 12 U.S.C. §§ 2013 ("Each Farm Credit Bank . . . shall have power to— . . . exercise . . . all such incidental powers as may be necessary or expedient to carry on the business of the bank"); 2073 (20) (same as to "[e]ach production credit association"); 2093 (20) (same as to "[e]ach Federal land bank association"); 2122 (16) (same as to "[e]ach bank for cooperatives"); 3012 (18) (National Consumer Cooperative Bank "shall . . . have such other incidental powers as may be necessary or expedient to carry out its duties").

This Court's cases interpreting Section 24 (Seventh) do not contradict this interpretation of the incidental and necessary clause. Often, the Court has looked at the nexus between the expressly authorized activity and the activity in which national banks wanted to engage to determine if the incidental and necessary clause would so allow. In *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245 (1934), for example, this Court examined a bank's pledge of bonds to a depositor. The bank claimed that the ability to pledge securities to a depositor was incidental and necessary to deposit banking—an expressly authorized power.[10] Because banks had not historically engaged in such practice in the past, the Court held, the activity was clearly not "necessary" to the bank's ability to engage in deposit banking. And although making such pledges might be "convenient in the performance of an express power," that did not bring the activity within the incidental and necessary clause. *Pottorff*, 291 U.S. at 255 & n.7.

Clement National Bank v. Vermont, 231 U.S. 120 (1913) similarly does not support petitioners' argument. In *Clement*, the Court noted that incidental powers are those that " 'are *required* to meet all the legitimate demands of the [bank's] authorized business.' " *Id.* at 140, *quoting First Nat. Bank v. National Exch. Bank*, 92 U.S. 122, 127 (1875) (emphasis added). The Court first recognized that accepting deposits and paying interest were expressly authorized powers. Because the State could unquestionably require the bank to pay taxes on such interest which the bank would then, in turn, charge its depositors, the bank's decision to act as the State's agent, the Court held, fell within the bank's incidental and necessary power. Similarly, in *Franklin Nat. Bank v. New York*, 347 U.S. 373 (1954), heavily relied on by petitioners, this Court construed the incidental and necessary

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[10] "[R]eceiving deposits" is a power expressly conferred by Section 24 (Seventh).

clause as allowing a bank to advertise that it accepted savings deposits, by using the term "savings." Accepting deposits was the expressly authorized activity,[11] the Court held, and changed circumstances—"[m]odern competition for business"—made it reasonably necessary for banks to be able to advertise, truthfully, that they could engage in such activity.[12]

In contrast to this Court's cases, the courts of appeals have revised the statutory provision Congress enacted, rather than interpreting it. Although these courts generally have correctly required that any Section 24 (Seventh) power be directly related or ancillary to the exercise of an express banking power (because Congress has mandated that these subsidiary powers be "incidental"), the courts, like the Comptroller, have simply ignored the separate and independent requirement that an incidental power be "necessary" to the business of banking. *See, e.g., Arnold Tours, Inc. v. Camp,* 472 F.2d 427 (1st Cir. 1972) (holding that an activity "is authorized as an incidental power . . . if it is convenient and useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act" and failing to ac-

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[11] Although petitioners suggest that the banking "activity" in question was advertising, *see* NationsBank Br. at 26, in fact the banking activity at issue was receiving savings deposits. *See Franklin National Bank,* 347 U.S. at 377. The "incidental and necessary" activity was advertising the banking activity in which the bank was engaged, by using the term "savings."

[12] Other cases relied on by petitioners did not require the Court to reach the scope of the "incidental and necessary" clause at all. In *Colorado Nat'l Bank of Denver v. Bedford,* 310 U.S. 41 (1940), for example, offering safe-deposit boxes was found to be implicit in the express grant of power, both because Section 24 (Seventh) places a limit on the ability to conduct safe-deposit business, and because offering safe-deposit boxes was the functional equivalent of accepting "special deposits," an activity that is expressly authorized by the statute. *Id.* at 48-49.

knowledge this Court's rejection of the "convenience" standard in *Pottorff*).

The lax interpretations of Section 24 (Seventh) undertaken by the Comptroller and the courts of appeals over the years have not given full effect to the plain language of that provision; the word "necessary" has been virtually erased from the statute. As dictated by this Court's jurisprudence, that word—purposefully inserted by Congress—must be given the effect that the statutory language requires.

C. The Comptroller Has Not Demonstrated That the Sale of Annuities Is an Incidental and Necessary Bank Power.

The Comptroller seems to believe that if he authorizes a national bank to engage in a certain activity then that activity, *a fortiori*, is "necessary" to allow the bank to conduct its enumerated banking powers. Fed. Br. at 23. Indeed, the Comptroller contends that the courts are not "competent" to judge the question. *Id.* at 42.[13] NationsBank and its *amici* make their position more clear: national banks must be assured that the Comptroller's rulings as to their powers are irreversible. *See* NationsBank Br. at 18; New York Clearing House Ass'n Br. at 4, 7-8. But Congress did not grant the Comptroller unbridled authority to shape national bank powers—to de-

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[13] The Comptroller's lack of respect for court decisions invalidating his actions was made clear in the agency's recent letter to Blackfeet National Bank approving the Bank's underwriting and selling of a so-called "Retirement CD," a product Chairman Dingell of the House Committee on Energy and Commerce described as "functionally a deferred life annuity." In the agency's letter, lodged with the Court for its review, the Comptroller made clear that he believes the Fifth Circuit's decision in this case failed to give him proper deference and therefore he would ignore it. Ltr. at 5 n.4. In his letter to the Comptroller, also lodged with the Court, Chairman Dingell recognized that the Comptroller's sanctioning of Blackfeet's actions "directly conflicts" with the Fifth Circuit's *VALIC decision*. Dingell Ltr. at 2.

fine, at his will, the "business of banking." Although the Comptroller may be genuinely and justifiably concerned about the future of national banks, that concern does not permit him to ignore Congress' directives. Without an express statutory authorization, national banks may not engage in any activity unless it is an "incidental power [ ] necessary to carry on the business of banking."

No evidence has been presented, nor was there any finding by the Comptroller, that the sale of annuities meets the proper test for an incidental and necessary power. There is nothing about the sale of annuities that makes them either a necessary means of carrying out the express banking powers or necessary to the business of banking in any other way.

Instead, by a bootstrap approach, petitioners maintain that a bank's sale of annuities is a proper incidental power by claiming that annuities are "similar to" and "resemble" other products sold by national banks, such as securities and certificates of deposit, which in turn have been regarded as falling within the purview of the incidental powers clause. The Comptroller contends that because national banks are purportedly empowered to broker "financial investment instruments" generally, they are permitted to sell any product that the Comptroller believes fits within this amorphous description.

Contrary to petitioners' apparent assumption, however, nothing in the National Bank Act authorizes national banks to "broker[] investment instruments for their customers." Fed. Br. at 22; NationsBank Br. at 19-20. "Financial investment instrument" is not a statutory term that can be interpreted and applied to the particular facts here. The phrase was fabricated by the Comptroller for the purpose of expanding national banks' powers; it appears nowhere in the National Bank Act. Thus, there is no basis for deferring to the Comptroller's conclusion that annuities constitute such so-called "financial investment instruments."

No court has ever authorized national banks' brokerage of "financial investment instruments." [14] Thus, the Comptroller may not permit national banks to broker expensive art, valuable antiques, estate jewelry or coin collections, for example, even though they are often "treated as investment products in the marketplace." NationsBank Br. at 13. This is simply *not* the relevant inquiry under Section 24 (Seventh).

Chairman Dingell succinctly explained the fallacy of the Comptroller's reasoning in a letter to the agency regarding its recent approval of a national bank's marketing of a deferred annuity called a "Retirement CD" (*see* n.13 *supra*):

> Congress most recently refused to repeal this legal separation [between banking and insurance and other forms of commerce] in 1991 when it considered major bank reform legislation that would have allowed banks to engage in commerce. The Bush Administration's argument [15] for this legislation, that banks need a "synergism" among the products they provide, was quite similar to the proclamations of the Comptroller in his letter: "A national bank's express powers allow it to design products which augment its traditional bank activities" and "The Retirement CD is a logical outgrowth of the Bank's business mandate which, as with any bank, is to offer its customers competitive and innovative financial products." This is an interesting idea, but banks simply have no such 'mandate'. This erroneous line of reasoning would

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[14] To the contrary, courts have carefully confined their analyses and decisions to the particular activity at issue. *See, e.g., First Nat'l Bank v. City of Hartford*, 273 U.S. 548 (1927) (power to sell mortgages and evidences of debt). To read these decisions as a broad grant of authority to banks to engage in the sale of any sort of "financial" product is a perversion.

[15] *Modernizing the Financial System: Recommendations for Safer, More Competitive Banks*, Department of the Treasury, February 5, 1991.

allow banks to do any financial activities they wanted, whether insurance, securities, or any other—and is not only contrary to the laws currently applicable to banks (see, e.g., the GlassSteagall Act), but was also rejected by Congress when it refused to enact the 1991 legislation that proposed granting such powers to banks. (Internal citations omitted).

In any event, there are fundamental and critical differences between the so-called "financial investment instruments" whose sale by national banks have been authorized (because they were found to facilitate one of the expressly enumerated bank powers) and annuities. Unlike a bank's sale of securities and CDs and other debt instruments, a bank's sale of annuities in no way facilitates its essential deposit-taking and credit-granting functions.[16] Unlike a bank's brokerage of securities and futures and options contracts, there is no clearing function involved or performed by a bank in connection with its brokerage of annuities. As recognized by the Comptroller, clearing involves an extension or substitution of the bank's credit for that of its customer—a quintessential banking function. Precisely because of the presence of the clearing aspect involved in a bank's sale of these other products, and the fact that the clearing function is incidental to the express traditional bank powers of credit extension or substitution, the Comptroller has ruled that such sales are an incidental banking function. *See, e.g.*, OCC Ltr. 494 (Dec. 20, 1989), *reprinted in* [1989-1990 Transfer Binder] (Fed. Banking L. Rpt. (CCH) ¶ 83,083.[17] An-

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[16] *See* Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 G. Wash. Law Rev. 676, 718 (1983) ("Since insurance annuities do not serve to support the important deposit-taking and credit-granting functions of banks, such transactions are not incidental to the business of banking.").

[17] As stated in OCC Ltr. 494 pertaining to a bank's sale of securities and futures and options, upon which the Comptroller relied in its ruling at issue:

nuity sales do not have a clearing component. Therefore, the parallels for purposes of the incidental powers clause are illusory.

The Comptroller's assertion that annuities "resemble" certificates of deposit sold by national banks is not only misleading, but wrong. Unlike in a bank's sale of a bank CD to its customer, no debtor-creditor relationship is established between the bank and the customer when the bank sells an annuity. Instead, a debtor-creditor relationship is established *only* between the customer and the insurance company issuing the annuity—not the bank which sells the annuity as an agent for the company. *See, e.g., Crossman Co. v. Rauch,* 263 N.Y. 264, 273 (1934) ("the obligation of the insurance company constitutes a debt from the *company* to the beneficiary under the policy [annuitant]") (emphasis added). This distinguishes the two activities viz-a-viz the bank's enumerated powers, since the debtor-creditor relationship is at the heart of the bank's principle functions.

Furthermore, national banks have never been permitted to engage in, and indeed have not in the past engaged in, the sale of annuities (outside the limited powers conferred by Section 92): the activity is not within national banks' *traditional banking* powers. Nor, before the decisions at issue here, have federal regulators permitted such activity.[18] This distinguishes the sale of annuities from any

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> part of this brokerage service—namely, clearing—is itself a credit extension process.

Clearing is related to two other traditional and express bank credit functions in which the bank adds its credit to, or substitutes its credit for, that of its customer—a bank's issuance of bankers' acceptance and letters of credit.

[18] As recently as 1978, the Comptroller ruled that national banks were *not* empowered to sell annuities. *See* Letter from Charles F. Byrd, Asst. Director, Legal Advisory Services Division (June 16, 1978) R. 7-8. It was the Comptroller's abrupt change in this policy that prompted national banks to race into the annuities business.

of the sanctioned activities upon which petitioners would rely. *See, e.g.*, OCC Ltr. 494 (agricultural futures and options contracts); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940) (leasing safe deposit boxes).

The fact that banks would like to sell annuities because they generate revenue—which is really the motivating force behind the banking community's attempt to move into this area—cannot translate into the required "incidental and necessary" showing. Nothing said by any party in this case indicates that a national bank reasonably needs annuity-agent powers in order to effectively engage in banking practices. Although the Comptroller might wish national banks had been given a broader grant of authority, his remedy is to seek Congressional action, not to ignore the plain meaning of express statutory terms. *See Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364 (1986) (holding that it is for Congress, not the agency or courts, to remedy any perceived fault with a federal statute).

II. SECTION 92 DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 24 (SEVENTH) TO AUTHORIZE NATIONAL BANKS' SALE OF INSURANCE.

Congress enacted the predecessor of Section 24 (Seventh), including the provision of "incidental" and "necessary" powers, in 1863. Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 668. In 1916, then-Comptroller John Skelton Williams wrote in a letter to the Senate Banking and Currency Committee requesting that national banks located in small towns be permitted to act as insurance agents. 53 Cong. Rec. 11001 (daily ed. July 14, 1916). The Comptroller expressed a desire to find a statutory mechanism whereby "the powers of small national banks might be *enlarged* so as to provide them with additional sources of revenue and to place them in a position where they could better compete with local State banks and with

companies which are sometimes authorized under the law *to do a class of business not strictly that of commercial banking." Id.* (emphasis added).[19] Accordingly, the Comptroller proposed an amendment to the National Bank Act.

Noting that national banks were already granted "incidental" and "necessary" powers, Comptroller Williams explained that his proposed amendment was nevertheless required because "[n]ational banks are not given either expressly or by necessary implication the power to act as agents for insurance companies." *Id.*[20] Comptroller Williams therefore clearly understood that a national bank's acting as agent for an insurance company was *not* an "incidental power . . . necessary to carry on the business of banking" under Section 24 (Seventh).

This letter constitutes virtually the entire legislative history of Section 92. *See id.; U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173 (1993). Comptroller Williams' proposed amendment was

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[19] *Amici* Conference of State Bank Supervisors' ("CSBS") suggestion that Section 92 was motivated by Congress' desire to provide insurance agents to customers in small towns is flatly wrong. *See* CSBS Br. at 18-19 & n.9. Rather, Congress was concerned with failing small town banks and wanted to provide them an additional revenue source—revenue they could not earn through their traditional banking business pursuant to Section 24(Seventh). *See* 53 Cong. Rec. 11001 (daily ed. July 14, 1916). Therefore, Congress empowered small town banks (and *only* small town banks) to sell insurance and act as real estate brokers (the latter grant of power being later repealed).

[20] This view conformed with the opinion of the Federal Reserve Board, which ruled that national banks had no authority, express or implied, to engage in insurance agency activities. The Board explained that "[a]ny such *extension* of the powers of national banks must be left to the consideration of Congress." 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916) (emphasis added). At the time—as now—national banks were granted the power "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." *Id.* at 73.

formally introduced on the Senate floor together with Mr. Williams' letter by the bill's sponsor, who referred to the letter as his sole explanation for introducing the amendment. *See* 53 Cong. Rec. S11002 & S11153 (1916). That is, the letter effectively became the sponsor's words endorsing the amendment. Comptroller Williams' comments, explaining both Section 92 and Section 24 (Seventh), are therefore entitled to great deference.[21]

Congress enacted Comptroller Williams' proposed amendment with only slight alteration and without debate or discussion.[22] *See* Act of Sept. 7, 1916, Pub. L. No. 64-270, 39 Stat. 752-53, codified at 12 U.S.C. § 92 (Supp. V 1993). The limited insurance-agency provision was added not as an amendment to Section 24 (Seventh), but rather as a separate stand-alone section. The critical language of Section 92 provides:

> [*i*]*n addition to the powers now vested by law in national banking associations* organized under the laws of the United States any such association located

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[21] *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) (explanation of drafter entitled to great weight in determining congressional intent); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute."); *NLRB v. Fruit Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964) (Black, J., concurring) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

In addition, as a contemporaneous interpretation of the meaning of the statute by the agency charged with implementing that statute, the 1916 Comptroller statements are entitled to great weight. *See Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). *See also Mountain States T. & T. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) (same); K. Davis, *Administrative Law Treatise* Vol. III § 6.3 at 244 (1994) (same).

[22] The only alternation was an upward revision of the population figure from the 3000 person figure suggested by Comptroller Williams to 5000 persons. 53 Cong. Rec. S11153 (July 14, 1916).

> and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . . (Emphasis added).

As the Fifth and Second Circuits have recognized, prior to enactment of Section 92 it was "universally understood that no national banks possessed *any* power to act as insurance agents." *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968) (emphasis in original); *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 155 (2d Cir. 1992) (same), *cert. denied*, 113 S. Ct. 2959 (1993). By its express *addition* to national banks' existing banking powers, Section 92 constituted the sole source of authority for national banks to engage in insurance-agency activity.[23] Section 92 was thought necessary precisely for the reason that, as was universally understood at the time, national banks otherwise had neither the express nor incidental power to sell insurance—of any kind. Section 92 thus reflects Congress' understanding that insurance-agency powers were beyond the power conveyed by the other provisions of the National Bank Act—including the grant of "such incidental powers as shall be necessary to carry on the business of banking."

This is precisely the reasoning this Court used in *Texas & Pac. Ry. Co. v. Pottorff*. In *Pottorff*, the Court held that national banks lack power to pledge their assets to secure a private deposit. 291 U.S. at 251. The Court ruled that such activity was not an incidental and neces-

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[23] This Court has routinely applied the interpretive principle that an affirmative grant of a specific power includes a denial of powers not granted. *See, e.g., Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."); *National R.R. Passenger Corp. v. Passengers Ass'n*, 414 U.S. 453, 458 (1974) (same).

sary power. In so holding, the Court reasoned that an amendment to the National Bank Act to provide *limited* power to pledge assets to secure deposits "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits." *Id.* at 258 & n.13 (citing legislative history similar to that of Section 92). The Court noted that the fact that Congress enacted the limited power in a separate section, rather than as an amendment to Section 24 (Seventh), indicated that Congress did not mean merely to clarify that the power of a national bank to pledge its assets to secure deposits was contained in the grant of "incidental" powers. *Id.* Similarly, the enactment of the limited insurance-agency authority in a separate statutory provision (Section 92) refutes any suggestion that it was merely a clarification or so-called "supplementation" of powers already conferred by Section 24 (Seventh).

Faced with the inevitable conclusion to be drawn from Section 92—insurance agency powers are not conferred by Section 24 (Seventh)—petitioners argue that Section 92 pertains to the sale of only "general" lines of insurance, not so-called "special" insurance, such as annuities. It is not at all clear what distinction petitioners intend to draw between different types of insurance,[24] but no such distinction can be found in Section 92.

To begin, the word "general" appears nowhere in the text of the statute. Apparently, petitioners would insert the word so that the statute would read: "act as agent

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[24] The distinction petitioners purport to draw is entirely unprincipled. Other than annuities, it is not at all clear what types of insurance would be excluded under their theory; and, other than "fire" and "life" insurance, it is not clear what would be included. Indeed, it is significant that the Comptroller does not articulate the types of insurance the sale of which is and is not permitted by Section 92. Although it serves his present purposes to argue that Section 92 is a narrow grant of power, in other contexts he is all too willing to interpret the power broadly. *See* 4 & n.1 *supra*.

for any fire, life or other *general* insurance company. . . ." As enacted by Congress, Section 92 imposes no limitation whatsoever on the type of insurance company for which a national bank may act as agent. The plain language indicates that a bank may serve "any" company; fire and life companies are simply examples. There is no other way to understand the statute—without rewriting it, as petitioners would do.

Moreover, petitioners focus on the wrong words. Contrary to the Comptroller's suggestion, Section 92 does not refer to "some 'insurance' sales." Fed. Br. at 41. NationsBank and its *amici* blatantly misrepresent Section 92's provisions, contending that it "specifically enumerate[s]" "fire and life insurance." NationsBank Br. at 46; *see also id.* (referring inaccurately to "Congress' specification of 'fire' and 'life' insurance"); New York Clearing House Ass'n Br. at 29 (referring to the "general forms of insurance enumerated in the provision"). The statute does not refer to or enumerate any form of insurance product. Rather, Section 92 authorizes national banks to "act as agent for *any* fire, life or other *insurance company* . . . by soliciting and selling *insurance* and collecting premiums on policies issued by such company." 12 U.S.C. § 92 (Supp. V 1993) (emphasis added). If there were some limitation imposed by Section 92—and there is not—it would be as to the types of *companies*, not the types of insurance.[25] In any event, Section 92 clearly authorizes small town national banks to act as agents for life insurance companies. Hence, those banks can sell annuities issued by life insurance companies only pursuant to Section 92.

Petitioners argue that courts must construe Sections 92 and 24 (Seventh) harmoniously. *See* NationsBank Br. at 39-40. But this is precisely what the Fifth Circuit did: it correctly construed Section 24 (Seventh)

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[25] Contrary to the Comptroller suggestion, there is no possible grammatical way to read "fire and life" as modifying "insurance," rather than "insurance company." *See* Fed. Br. at 41 n.23.

as *not* authorizing national banks to sell annuities, and Section 92 as conferring limited authority to engage in that activity. To paraphrase NationsBank, Congress obviously saw no tension between the two provisions because Section 24 (Seventh) does not authorize banks to act as agents for insurance companies—that activity is not "incidental and necessary to the business of banking," as the Comptroller and Congress indicated in 1916 when Section 92 was enacted.

Finally, in an effort to avoid Section 92's import, petitioners argue that annuities do not constitute "insurance" within the meaning of Section 92. There is no basis for this argument, as Respondent demonstrates.

As petitioners and their *amici* admit, federal banking law does not define "insurance." But that does not mean that Congress intended the Comptroller to give that term whatever meaning he saw fit. It is not surprising that the 1916 Congress failed to define the term "insurance" as used in Section 92. At the time, it was universally understood that the regulation of the business of insurance was beyond the constitutional power of Congress. *E.g., United States Dep't of Treasury v. Fabe,* 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 538 (1978). Indeed, the regulation of insurance was left exclusively to the States. *Fabe,* 113 S. Ct. at 2207. Thus, the only reasonable conclusion is that the 1916 Congress meant to incorporate in the term "insurance" those products defined or regulated as insurance by the various States in 1916. And, as explained more fully in Respondent's brief, the vast majority of States then, as now, defined and/or regulated annuities as "insurance."

Contrary to NationsBank's assertion, NationsBank Br. at 45, the Comptroller has no "special expertise" in determining what is and what is not "insurance." Indeed, no federal agency has such expertise precisely because, pursuant to tradition and federal statute, Congress has left

regulation of the business of insurance to the States. Thus, there is no principled basis for deferring to the Comptroller's judgment that annuities are not "insurance." *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984) (deference based on agency's "great expertise").

III. THE BUSINESS PRACTICES OF STATE BANKS DO NOT SUPPORT THE EXTENSION OF THE POWER TO SELL ANNUITIES TO NATIONAL BANKS.

In its *amicus* brief, the American Bankers Association ("ABA") maintains that, because many state-chartered banks are purportedly permitted to sell insurance, national banks should be permitted to sell annuities—a form of insurance.[26] *See* ABA Br. at 12-16. This contention is without merit as a matter of both fact and law.

First, the overwhelming state authority that ABA invokes simply does not exist. The ABA contends that 34 States grant banks at least some insurance sales powers. However, the Appendix the ABA attached to its brief itself demonsratates that the vast majority of States *prohibit or restrict* such powers: of the 34 States the ABA contends permit their banks to sell insurance, 9 limit that grant of authority to state-chartered banks located in small towns—a power commensurate with small town national banks' Section 92 insurance sales authority;[27] an

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[26] *See Variable Annuity Life Insurance Co. v. Clarke*, 998 F.2d 1295, 1300 (5th Cir. 1993) ("All fifty states currently regulate annuities under their insurance laws."); *id.* at n. 2 (citing the state statutes defining annuities as insurance); *Securities and Exchange Comm. v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959) ("all the States regulate 'annuities' under their insurance laws").

[27] These 9 States are Arkansas, Colorado, Florida, Georgia, Kansas, Mississippi, Missouri, New Mexico, and Washington.

additional 4 of these States prohibit the sale of insurance by banks except for those that were engaged in such sales before a specified date;[28] another 2 permit only savings banks to engage in insurance-agency activity;[29] and the ABA's description of the insurance sales authority in at least four other States is simply incorrect.[30]

Thus, most States—at least 35—completely prohibit or severely restrict state-chartered banks from selling insurance. Therefore, even if the ability of state-chartered banks to sell insurance were relevant to the powers granted national banks, it would indicate that the sale of insurance should *not* be considered an incidental power necessary to the business of banking because States generally prohibit state-chartered banks from engaging in that activity.

The ABA's legal assertion that "this Court has held that a power is incidental if it is a 'generally adopted method' of banking," ABA Br. at 13 (quoting *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 50 (1940)), is also incorrect. The ABA's contention is improperly premised on the notion that an activity must be considered part of "the business of banking" if state-chartered banks engage in that activity. An activity does not be-

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[28] These States are Connecticut, Kentucky, Louisiana and Texas. Indeed, the United States District Court for the Eastern District of Kentucky recently reaffirmed that Kentucky law generally prohibits banks from selling insurance in a case in which the ABA appeared as an *amicus*. *See Owensboro National Bank v. Wright*, 803 F. Supp. 24 (E.D. Ky. 1992) (appeals pending).

[29] These two States are New York and Massachusetts.

[30] The ABA categorizes Alaska, Minnesota and Tennessee as permitting state-chartered banks to sell insurance, *see* ABA *Amicus* Brief, App. 1, but Alaska Banking Code § 06.05.272(d), implemented on January 1, 1994, specifically prohibits that activity, and Minnesota and Tennessee limit that grant of authority to banks located in small towns. *See* Minn. Stat. § 48:61; Tenn. Code Ann. §§ 42-2-601 and 56-6-201. In addition, Indiana prohibits banks from acting as agent for life insurance companies. *See* In. Fin. Code § 28-11-2.

come part of the "business of banking" just because banks sometimes engage in that activity. Indeed, while the past practice of *national banks* may be relevant to the question of whether a particular practice is "necessary to carry on the business of banking," it certainly is not determinative.

The ABA's contention ignores the reality of our dual banking system: *two* independent banking systems exist in the United States—a federal banking system and a state banking system. In contrast to state-chartered banks, national banks are creatures of federal law, chartered by the federal government. *See Franklin Nat'l Bank v. New York*, 347 U.S. at 375. It is well-settled that national banks "are instruments designed to be used to aid the government in the administration of an important branch of the public service." *Farmers' & Mechanics' Bank v. Dearing*, 91 U.S. 29, 33 (1875). The United States has established this separate national banking system "to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories." *Franklin Nat'l Bank*, 347 U.S. at 375. "[T]he act under which national banks are organized constitutes a complete system of their government." *Pottorff*, 291 U.S. at 253. Put simply, state legislatures cannot grant national banks power not afforded by Congress. Therefore, contrary to the ABA's suggestion, activities in which state-chartered banks may be authorized to engage under state law have no direct bearing on the determination of whether that activity is an "incidental power . . . necessary to carry on the business of banking" within the meaning of 12 U.S.C. § 24 (Seventh).

Colorado National Bank does not suggest otherwise. In that case, the Court did not hold that methods of banking "generally adopted" by state-chartered banks are incidental powers. Instead, the Court found that *national banks* had traditionally engaged in the activity in question —the leasing of safe deposit boxes—and that that activity relates to a core banking function, namely, provid-

ing deposit services, and therefore was impliedly included in that function. *See* 301 U.S. at 50.

Indeed, in proposing that small town banks be permitted to sell insurance, then-Comptroller Williams explained that some States had already chosen to permit their state-chartered banks to engage in that activity, which is "not strictly that of commercial banking." 53 Cong. Rec. 11001 (daily ed. July 14, 1916). When Congress enacted Section 92 in 1916, it "place[d] [national banks] in a position where they could better compete with [those] local State banks." *Id.* If the "generally adopted practice" by small town state-chartered banks of selling insurance would have rendered that activity "incidental" to the business of banking, then enactment of Section 92 would have been wholly unnecessary.

Thus, the ABA's statement that "under New York law a New York State-chartered bank may own a subsidiary engaged in any line of business that is not otherwise unlawful," ABA Br. at 14 (citing *New York State Association of Life Underwriters v. New York State Dept. of Banking*, 83 N.Y.2d 353 (1994)), is completely beside the point because, under *federal* law, a national bank may engage in only specifically authorized activities or in "incidental" activities that are "necessary to carry on the business of banking." The fact that some State legislatures have made the policy decision to permit their state-chartered banks to engage in a whole array of activities beyond the "business of banking" does not mean that national banks can engage in such activities as well. For example, the ABA's 1990 survey of the products and services that state-chartered banks are authorized to provide under state laws found that—unlike under the National Bank Act—many States permit their state-chartered banks to engage in a wide variety of non-banking activities including the operation of travel agencies, providing data processing services, and offering management consultant services. But, the Comptroller does not dispute that the operation of a travel agency is not an in-

cidental power necessary to the business of banking even though, as the ABA has found, many state-chartered banks routinely engage in that activity. *See Arnold Tours, Inc. v. Camp,* 472 F.2d 427 (1st Cir. 1972).

Although *Amici* agree that " 'the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking,' " ABA Br. at 12 (quoting *M&M Leasing Corp. v. Seattle First Nat'l Bank,* 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied,* 436 U.S. 956 (1978)), those powers must still be limited to the business of banking. The very old business of selling of insurance simply cannot be construed as being part of that banking business.

CONCLUSION

The authority to act as agent for an insurance company in the sale of insurance, including annuities, is limited to those national banks located and doing business in towns of 5000 or less (pursuant to Section 92); a national bank cannot invoke its "incidental and necessary" power to avoid this statutory limitation.

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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(18) (18)

Nos. 93-1612 and 93-1613

In The

Supreme Court of the United States

October Term, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., et al.,

Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, et al.,

Respondent.

EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY, et al.,

Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, et al.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association of the principal insurance regulatory officials of the 50 states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

The Executive Committee of the NAIC, which consists of seventeen insurance commissioners from all regions of the country, voted to file a brief of *Amicus Curiae* in this action, on behalf of the full NAIC membership. The interest of the NAIC in filing this brief is based on the commissioners' collective interest in retaining regulatory authority over the sales of annuities.

The insurance commissioners have been charged by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1994), and by their own state statutes. *See, e.g.*, TEX. INS. CODE § 1.01A(b) (NILS 1993) to regulate the business of insurance. Accordingly, insurance commissioners have consistently regulated:

- the life insurance companies that are licensed to sell annuity products;
- the development and characteristics of annuity products; and
- the agents who sell annuity products.

The insurance commissioners respectfully encourage this Court to affirm the decision of the Fifth Circuit, *VALIC v. Clarke*, 998 F.2d 1295 (5th Cir., 1993), *rehearing denied*, 13 F.3d 833 (5th Cir., 1994), so that the sale of annuities will remain within the regulatory scope of authority of the individual state insurance departments. The NAIC believes that this would be in the best interest of the public insurance consumers whom the regulators are charged to protect.

SUMMARY OF THE ARGUMENT

The decision of the Fifth Circuit in *VALIC*, 998 F.2d 1295, should be affirmed because the Fifth Circuit correctly held that Section 92 of the National Bank Act, 12 U.S.C. § 92 (1994), prohibits national banks from selling annuities in cities with more than 5,000 residents. The Section 92 insurance prohibition clearly applies to annuity sales because annuities are insurance products. Evidence that annuities are insurance products is found in the extensive compilation of insurance laws regulating annuities as insurance products, as well as the fact that annuities possess all requisite characteristics of insurance products. *See, Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L. Ed. 2d 261 (1979).

Both the district court and the Fifth Circuit considered *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984) to determine whether it would be proper to defer to the decision of the Office of the Comptroller of the

Currency (OCC), Op. OCC, unpublished (March 21, 1990), which allowed national banks to sell annuities in cities of any size. However, the district court's *Chevron* analysis was faulty. *VALIC v. Clarke*, 786 F. Supp. 639 (S.D. TX, Houston Div., 1991). Congress specified in Section 92 that bank sales of insurance should be limited to small towns. Therefore, the OCC's decision, and the district court's deference to that decision, frustrated Congressional intent by authorizing national bank sales of annuities in cities with more than 5,000 residents.

Although Petitioners argue that annuity sales were incidental and necessary to the business of banking, Congress has not specified this. *See*, 12 U.S.C. § 24 (Seventh) (1994). Additionally, there is no evidence to support such a claim.

Finally, Petitioner NationsBank argued that the Fifth Circuit erred by failing to consider the Glass-Steagall Act, 12 U.S.C. §§ 347a, 347b, 412 (1994). That Act, however, was never at issue in this case, because the OCC never relied on it. Op. OCC (March 21, 1990).

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT SECTION 92 OF THE NATIONAL BANK ACT PROHIBITS NATIONAL BANKS FROM SELLING INSURANCE IN CITIES WITH MORE THAN 5,000 RESIDENTS

Section 92 of the National Bank Act, 12 U.S.C. § 92 (1994), was enacted in 1916 and its validity was recently affirmed by this Court in *U.S. National Bank of Oregon v.*

Independent Insurance Agents of America, 113 S.Ct. 2173, 124 L. Ed. 2d 402 (1993). Section 92 grants national banks authority to "act as the agent for any fire, life or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by" insurance companies when the banks are "located and doing business in any place the population of which does not exceed five thousand inhabitants." 12 U.S.C. § 92.

The Fifth Circuit relied on the plain language of Section 92 to determine that it "explicitly authorizes national banks in towns with a population smaller than 5,000 to act as insurance agents." *VALIC,* 998 F.2d at 1298. As the Fifth Circuit pointed out, its earlier decision in *Saxon v. Georgia Association of Independent Insurance Agents,* 399 F.2d 1010 (5th Cir., 1968) reached the same conclusion by applying the canon of statutory construction *expressio unius est exclusio alterius* meaning that "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 403 (6th ed. 1990). Applying the same canon of statutory construction in this case, the Fifth Circuit concluded that because Section 92 explicitly authorizes national banks to act as insurance agents in towns of less than 5,000, insurance sales in towns of more than 5,000 are prohibited. *VALIC,* 998 F.2d at 1298.

The Fifth Circuit noted that the Second Circuit followed this reasoning in *American Land Title Association v. Clarke,* 968 F.2d 150 (2d Cir.), *cert. denied,* 113 S.Ct. 2959 (1993). The Second Circuit reversed a Comptroller's directive that allowed national banks to act as title insurance agents in towns of more than 5,000 residents. The Second Circuit wrote: "had Congress intended to grant national banks located in towns with a large population

the authority to sell insurance, it would never have limited the grant of authority in Section 92 to national banks in locations with under 5,000 residents." *Id.* at 155.

The Fifth Circuit's decision is clearly based on sound logic, accepted rules of statutory construction, and supporting precedent. In fact, the Fifth Circuit cited several other cases that relied on the same canon of statutory construction. *VALIC*, 998 F.2d at 1298 (citations omitted). Additionally, legislative history supports the Fifth Circuit's holding that national banks may act as insurance agents only in those towns with less than 5,000 residents. *VALIC*, 998 F.2d at 1299.

II. ANNUITIES ARE INSURANCE PRODUCTS WHICH MAY NOT BE SOLD BY NATIONAL BANKS IN CITIES WITH MORE THAN 5,000 RESIDENTS

A. ANNUITIES ARE INSURANCE PRODUCTS REGULATED BY STATE INSURANCE DEPARTMENTS PURSUANT TO STATE INSURANCE LAWS

The OCC argued that it has "been charged by Congress with the oversight and regulation of national banks." OCC brief, S.Ct., p. 13 (July 1994). Subsequent language implies that this Court, therefore, should be swayed to defer to the OCC's letter ruling of March 21, 1990. *Id.* at 14. This argument ignores, however, well-established rules of deference (*See,* § III. herein) as well as the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1994).

In 1945, Congress enacted the McCarran-Ferguson Act which dictates that the business of insurance and

every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C. § 1012. The declared purpose of this Act indicated that Congress concluded state regulation of the business of insurance was in the public interest. 15 U.S.C. § 1011. The McCarran-Ferguson Act authorized, and in fact required, the states to develop a complete scheme of statutes and regulations which would govern the underwriting, sales, claims, licensing, and other aspects of insurance transactions. *See, e.g.*, TEX. INS. CODE §§ 22.23, 3.33, 3.42, 3.44c, 3.49-2, 21.27, 3.28 (NILS 1988). Many of the state laws controlling annuities and the insurance companies that provide them, as well as the insurance agents who sell them, are based on NAIC model laws and regulations.

The NAIC has developed, over a period of many years, a comprehensive scheme of model statutes and model regulations to govern all lines and aspects of insurance underwriting, sales, solvency, licensing, and operations. These laws and regulations were carefully developed through a quasi-legislative process in a public forum, by insurance regulators and their staffs. These insurance experts, including attorneys, actuaries, rating experts, economists, and insurance specialists thoughtfully crafted the annuities statutes and regulations to provide maximum protection and security for purchasers of annuity contracts. The NAIC annuities models include six model regulations, a buyer's guide for annuities, annuities mortality tables, reserve valuation guidelines, and two statutes.

More specifically, the NAIC Model Variable Annuity Regulation, *NAIC Model Laws, Regulations and Guidelines,*

Vol. II, p. 250 et seq. (1994), provides requirements for: the qualifications of insurance companies to issue variable annuities; separate accounts for companies to issue variable annuities; separate accounts for reserves for benefits; filing of contracts; variable annuity contracts; nonforfeiture benefits; required reports; foreign company protections for policyholders; and qualifications of agents for the sale of variable annuities. This model has been adopted in substantial part by twenty-three states.[1] Fourteen other states have adopted similar or related legislation or regulations.[2]

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[1] ALASKA ADMIN. CODE tit. 3 §§ 28.010 to 28.190 (1973) (All variable contracts); ARK. INS. RULE & REG. 6 (1970); CAL. ADMIN. CODE tit. 10 R. 2525 to 2533.1 (1972); COLO. ADMIN. INS. REG. 4-1-1 (1994); DEL. INS. REG. 1 (1980) (All variable contracts); GA. ADMIN. COMP. ch. 120-2-22 (1969); IDAHO INS. REG. 16 [IDAPA 18.01.16] (1993) (All variable contracts); IOWA ADMIN. CODE §§ 191-31.1 to 191-31.7 (1988); KAN. ADMIN. REGS. §§ 40-15-1 to 40-15-8 (1986); 806 KY. ADMIN. REG. § 15:010 (1984); LA. INS. REG. 28 (1969); MISS. INS. REG. L A & H 78-2 (1978); MO. ADMIN. CODE tit. 20 § 400-1.020 (1985); N.C. ADMIN. CODE tit. 11 ch. 11(B) § .0302 to .0305 (1988); N.D. ADMIN. CODE §§ 45-04-02-01 to 45-04-02-08 (1986); OKLA. INS. REGS. §§ 365:10-9-10 to 365:10-9-18 (1969); P.R.R. RULE XLV (1975); S.C. INS. R. 69-12 (Part A) (1988); S.D. ADMIN. R. 20:06:07:01 to 20:06:07:08 (1986); TENN. ADMIN. COMP. ch. 0780-1-17 (1978) (All variable contracts); VA. INS. REG. 3 (Case No. INS18623) (1969); WIS. ADMIN. CODE § INS. 2.13 (1981) (All variable contracts); WYO. INS. REGS. ch. XVI.1 (1968).

[2] D.C. R. & REGS. tit. 26 § 1004 (1961); FLA. ADMIN. CODE §§ 4-10.001 to 4-10.017 (1974); ILL. ADMIN. REG. §§ 1451.10 to 1451.100 (1972) (Parts of model; applies to all variable contracts); IND. ADMIN. tit. 760 R. 7 §§ 1-7-1 to 1-7-8 (1971); ME. INS. REG. ch. 310 (1984); MD. ADMIN. CODE tit. 9 subtit. 30 ch. 42 §§ .01 to .09 (1988); MICH. ADMIN. CODE R. 500.621 to

Similarly, the Model Variable Contract Law, *NAIC Model Laws, Regulations and Guidelines,* Vol. II, p. 260 et seq. (1994), details the licensing requirements applied to domestic life insurance companies which sell variable annuities. Section 4 of this model provides that the commissioner of insurance shall have sole authority to regulate the issuance and sale of variable contracts, and to issue such reasonable rules and regulations as may be appropriate to carry out the purposes and provisions of the Act. Thirty-four states have adopted this model in substantial part[3] and another seventeen states

500.629 (1978); MONT. CODE ANN. §§ 30-10-103 to 30-10-104 (1991); N.J. ADMIN. CODE §§ 11:4-1.1 to 11:4-1.5 (1959) (All variable contracts); N.M. INS. REGS. §§ 13-1-1 to 13-1-9 (1958); N.Y. ADMIN. CODE tit. 11 §§ 50.1 to 50.12 (Regulation 47) (1971); PA. ADMIN. CODE tit. 31 §§ 85.01 to 85.40 (1981) (Parts of model); TEX. ADMIN. CODE §§ 3.701 to 3.706 (1985); UTAH INS. R590-133 (1989).

[3] ALA. CODE §§ 27-38-1 to 27-38-6 (1986); ALASKA STAT. § 21.42.370 (1980); ARK. STAT. ANN. §§ 23-81-401 to 23-81-405 (1975); CAL. INS. CODE § 10506 (1984); COLO. REV. STAT. §§ 10-7-402 to 10-7-405 (1977); CONN. GEN. STAT. § 38a-432 (1983); DEL. CODE ANN. tit. 18 § 2932; HAW. REV. STAT. § 431:10D-118 (1988); IDAHO CODE §§ 41-1936 to 41-1939 (1971); 215 ILL. COMP. STAT. 5/245.21 to 5/245.25 (1977); IOWA CODE §§ 508A.1 to 508A.5 (1973); KY. REV. STAT. § 304.15-390 (1986); LA. REV. STAT. ANN. § 22:1500 (1976); ME. REV. STAT. ANN. tit. 24-A § 2537 (1973); MISS. CODE ANN. §§ 83-7-27 to 83-7-49 (1978); MO. REV. STAT. § 376.309 (1983); MONT. CODE ANN. §§ 33-20-601 to 33-20-606 (1989); NEV. REV. STAT. § 688A.390 (1971); N.M. STAT. ANN. § 59A-20-30 (1985); N.C. GEN. STAT. § 58-7-95 (1979); N.D. CENT. CODE §§ 26.1-33-13 to 26.1-33-17 (1985); OKLA. STAT. tit. 36 § 6061 (1973); OR. REV. STAT. §§ 733.220 to 733.230 (1973); 40 PA. CONS. STAT. § 506.2 (1974); R.I. GEN. LAWS §§ 27-32-1 to 27-32-9 (1977); S.C. CODE ANN. §§ 38-67-10 to 38-67-50 (1988); S.D. CODIFIED LAWS ANN. §§ 58-28-13 to 58-28-31 (1971); TENN. CODE ANN.

or territories have adopted related legislation or regulations.[4] The model and the similar laws adopted by the individual states are intended to apply to domestic life insurance companies involved in the sale of variable annuities.

The Standard Non-Forfeiture Law for Individual Deferred Annuities, *NAIC Model Laws, Regulations and Guidelines*, Vol. IV, p. 805 et seq. (1994), governs such specifics as non-forfeiture requirements, minimum values, computation of present value of policies, calculation of cash surrender values, calculation of paid-up annuity benefits, maturity date, disclosure of limited death benefits, inclusion of lapse time considerations, proration of values, and additional benefits. This model law has been adopted in substantial part by forty-seven states,[5]

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§§ 56-3-501 to 56-3-509 (1970); TEX. INS. CODE ANN. art. 3.75 (1985); UTAH CODE ANN. §§ 31A-5-217.5 (1992); VT. STAT. ANN. tit. 8 §§ 3855 to 3859 (1981); WASH. REV. CODE ANN. §§ 48.18A.010 to 48.18A.900 (1983); W.VA. CODE §§ 33-13A-1 to 33-13A-5 (1977); WYO. STAT. § 26-16-502 (1983).

[4] ARIZ. REV. STAT. ANN. § 20-651 (1982); D.C. CODE ANN. § 35-639 (1981); FLA. STAT. §§ 627.801 to 627.807 (1982); GA. CODE ANN. § 33-11-34 (1982); KAN. STAT. ANN. §§ 40-436 to 40-438 (1972); MD. ANN. CODE art. 48A § 362 (1973); MASS. GEN. LAWS ch. 175 § 132F (1982); MICH. COMP. LAWS § 500.925 (1974); MINN. STAT. §§ 61A.13 to 61A.21 (1978); NEB. REV. STAT. §§ 44-2201 to 44-2221 (1969); N.H. REV. STAT. ANN. §§ 408:23 to 408:34 (1977); N.J. REV. STAT. §§ 17B:28-1 to 17B:28-15 (1981); N.Y. INS. LAWS § 4240 (1984); OHIO REV. CODE ANN. § 3911.011 (1969); P.R. LAWS ANN. tit. 26 §§ 1329 to 1335 (1974); VA. CODE §§ 38.2-3113 to 38.2-3113.1 (1992); WIS. STAT. § 611.25 (1971), § 632.45 (1979).

[5] ALA. CODE § 27-15-28.1 (1984); ALASKA STAT. § 21.45.305 (1978); ARIZ. REV. STAT. ANN. § 20-1232 (1977); ARK. STAT. ANN. §§ 23-81-301 to 23-81-312 (1981); CAL. INS.

and the Virgin Islands adopted related legislation.[6]

Additionally, the NAIC has adopted an Interest-Indexed Annuity Contracts Model Regulation, NAIC Vol. II, p. 235 et seq. (1994), a Model Annuity and Deposit Fund Disclosure Regulation, NAIC Vol. II, p. 245 et seq.

CODE §§ 10168 to 10168.10 (1979); COLO. REV. STAT. §§ 10-7-501 to 10-7-510 (1977); CONN. GEN. STAT. § 38a-440 (1978); DEL. CODE ANN. tit. 18 § 2929A (1980); D.C. CODE ANN. § 35-508 (1978); GA. CODE ANN. § 33-28-3 (1982); HAW. REV. STAT. § 431:10D-107 (1988); IDAHO CODE § 41-1927A (1989); 215 ILL. COMP. STAT. 5/229.4 (1977); IND. CODE §§ 27-1-12.5-1 to 27-1-12.5-10 (1977); IOWA CODE § 508.38 (1981); KAN. STAT. ANN. § 40-428a (1978); KY. REV. STAT. § 304.15-315 (1978); LA. REV. STAT. ANN. § 22:173.1 (1991); ME. REV. STAT. ANN. tit. 24-A §§ 2541 to 2551 (1979); MD. ANN. CODE art. 48A § 408B (1980); MASS. GEN. LAWS ch. 175 § 144A (1979); MICH. COMP. LAWS § 500.4072 (1987); MINN. STAT. § 61A.245 (1979); MONT. CODE ANN. §§ 33-20-501 to 33-20-513 (1979); NEB. REV. STAT. §§ 44-407.10 to 44-407.23 (1979); NEV. REV. STAT. §§ 688A.361 to 688A.369 (1979); N.H. REV. STAT. ANN. §§ 409-A:1 to 409A:10 (1979); N.J. REV. STAT. § 17B:25-20 (1981); N.M. STAT. ANN. § 59A-20-33 (1985); N.Y. INS. LAW § 4223 (1985); N.C. GEN. STAT. § 58-58-60 (1979); N.D. CENT. CODE §§ 26.1-34-01 to 26.1-34-10 (1985); OHIO REV. CODE ANN. § 3915.073 (1983); OR. REV. STAT. §§ 743.275 to 743.295 (1977); 40 PA. CONS. STAT. § 510b (1980); R.I. GEN. LAWS §§ 27-4.4-1 to 27-4.4-12 (1993); S.C. CODE ANN. §§ 38-69-210 to 38-69-320 (1988); S.D. CODIFIED LAWS ANN. §§ 58-15-72 to 58-15-81 (1977); TENN. CODE ANN. §§ 56-36-101 to 56-36-112 (1978); TEX. INS. CODE ANN. art. 3.44b (1977); UTAH CODE ANN. § 31A-22-409 (1986); VT. STAT. ANN. tit. 8 § 3750 (1981); VA. CODE § 38.2-3220 to 38.2-3229 (1986); WASH. REV. CODE ANN. §§ 48.23.410 to 48.23.520 (1987); W.VA. CODE § 31-13-30a (1977); WIS. STAT. § 632.435 (1979); WYO. STAT. §§ 26-16-401 to 26-16-411 (1983).

[6] *See also* N.Y. ADMIN. CODE tit. 11 §§ 44.0 to 44.12 (Reg. 127) (1986); V.I. CODE ANN. tit. 22 §§ 970 to 975 (1968).

(1994), a Two-Tier Annuity Model Regulation, NAIC Vol. II, p. 247 et seq. (1994), a Modified Guaranteed Annuity Regulation, NAIC Vol. II, p. 255 et seq. (1994), Replacement of Life Insurance and Annuities Model Regulation, NAIC Vol. III, p. 613 et seq. (1994), Model Guideline Concerning the Commissioners Annuity Reserve Valuation Method, NAIC Vol. IV, p. 825 et seq. (1994), and Model Rule (Regulation) for Recognizing a New Annuity Mortality Table for use in Determining Reserve Liability for Annuities. NAIC Vol. IV, p. 821 et seq. (1994).

Collectively, these model laws and regulations and the actual state laws and regulations based on the NAIC prototypes, illustrate the comprehensive nature and detail of insurance laws and regulations governing all aspects of annuities transactions. Indeed, the Fifth Circuit noted that all fifty states currently regulate annuities under their insurance laws. *VALIC*, 998 F.2d at 1301, *citing*, state laws.[7] The complexity and inclusiveness of

[7] ARK. STAT. ANN. §§ 23-64-102(1), (3) (1987); CAL. INS. CODE § 101 (1977); COLO. REV. STAT. § 10-1-102(7) (1990); CONN. GEN. STAT. § 38-68t(a) (1990); DEL. CODE ANN. tit. 18 § 512 (1989); FLA. STAT. ANN. § 624.602(1) (1990); GA. CODE ANN. § 33-7-4 (1990); HAW. REV. STAT. § 431:1-204 (1985); IDAHO CODE §§ 41-103, 41-312 (1977); ILL. INS. CODE ch. 73, art. I, § 4 (1982); IND. CODE §§ 27-1-2-3(s) (1986); IOWA CODE § 508.31 (1990); KAN. STAT. ANN. § 40-401 (1990); LA. REV. STAT. ANN. § 22:6(1) (West 1969); ME. REV. STAT. ANN. tit. 24-A, § 411 (1990); MD. INS. CODE ANN. Act 48A, §§ 46(1), 65 (1991); MASS. GEN. L. ch. 175, § 47(16) (1987); MICH. COMP. LAWS Ann. § 500.602 (West 1990); MINN. STAT. ANN. § 61A.01 (1986); MISS. CODE ANN. § 83-7-1 (1972); MO. REV. STAT. §§ 375.158(2), 376.010 (1968); MONT. CODE ANN. § 33-2-108(2) (1990); NEB. REV. STAT. § 44-201 (1990); NEV. REV. STAT. § 680A.110 (1988); N.H. REV. STAT. ANN. § 408:24 (1983); N.J.

these laws and regulations is an indication of the seriousness with which state insurance departments regulate annuities as part of the responsibilities delegated to them by Congress. These laws were developed specifically for sales of annuities by life insurance companies, not by banks. If national bank subsidiaries are permitted to sell annuities, as allowed by the Comptroller's decision, banks may well be circumventing the laws intended to protect those who purchase annuity contracts from insurance companies.

The plain meaning of the annuities laws and regulations found in the insurance codes of the various states indicates that annuities are insurance products governed by insurance laws and regulations which are enforced by individual insurance departments, pursuant to Congressional delegation of authority. 15 U.S.C. §§ 1011, 1012.

REV. STAT. ANN. § 17:17-1(c) (1990); N.M. STAT. ANN. § 59A-7-2 (1988); N.Y. Ins. Law § 1113(a)(2) (McKinney 1990); N.C. GEN. STAT. §§ 58-7-15(2), 58-39-15(15) (1990); N.D. CENT. CODE §§ 26.1-26-11(1), (18) (1990); OHIO REV. CODE ANN. §§ 3902.02, 3911.01 (1990); OKLA. STAT. tit. 36 § 702 (1990); OR. REV. STAT. § 731.170(2) (1990); 40 PA. CONS. STAT. § 382(a)(1) (1990); R.I. GEN. LAWS § 27-32-1(a) (1989); S.C. CODE ANN. §§ 38-1-20(7), (19) (1989); S.D. CODIFIED LAWS ANN. § 58-6-20 (1990); TENN. CODE ANN. § 56-2-201(4) (1986); TEX. INS. CODE ANN. art. 3.01, § 1 (1981); UTAH CODE ANN. § 31A-1-301(44)(d) (1991); VT. STAT. ANN. tit. 8, § 3717 (1984); VA. CODE ANN. § 38.2-602 (1986); WASH. REV. CODE § 48.11.020 (1984); W.VA. CODE § 33-1-10(a) (1988); WIS. STAT. § 71.42(3), 610.21(4) (1980); WYO. STAT. § 26-1-102(a)(xvi), (xvii), 26-16-101 (1983).

B. ANNUITIES POSSESS REQUISITE CHARACTERISTICS OF INSURANCE PRODUCTS

Furthermore, the NAIC supports the Fifth Circuit's description of annuities which summarizes the many similarities between annuities and life insurance. The Fifth Circuit properly noted that both life insurance and annuities rely on actuarial calculations of mortality risk and risk-spreading, thereby satisfying a well-established requirement that insurance include some transfer and distribution of risk. *VALIC,* 998 F.2d at 1301, *citing, Group Life & Health Ins. Co. v. Royal Drug,* 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L.Ed. 2d 261 (1979).

The Fifth Circuit wrote:

> Both life insurance and annuities transfer the economic risk of death from the policyholder to the insurance company. Life insurance protects the insured against the economic risk of the insured's dying prematurely, while an annuity contract protects the insured against the possibility of outliving her resources. By issuing numerous life insurance and annuity contracts, an insurance company spreads the risk of policyholders living longer or shorter than predicted. *VALIC,* 998 F.2d at 1301.

The OCC suggested that *Black's Law Dictionary* supports its claims that annuities have investment characteristics, not insurance characteristics. OCC brief, S.Ct., p. 26 (July 1994). The OCC failed, however, to observe that the same dictionary defines an "annuity policy" as "an *insurance* policy providing for monthly or periodic payments to insured to begin at fixed date and continue

through insured's life." BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (emphasis added).

Additionally, Petitioners argued that a recent New York case found annuities to be investment products. OCC brief, S.Ct., pp. 34-35 (July 1994); NationsBank brief, S.Ct., pp. 5-6 (July 1994), *citing, New York State Ass'n. of Life Underwriters v. New York State Banking Dept.*, No. 38, 83 N.Y. 2d 353, 1994 N.Y. LEXIS 324 (Ct. App. N.Y., March 30, 1994). In that case the Court upheld a decision by the state banking department that authorized state-chartered commercial banks to purchase and sell annuities, either directly or through a subsidiary. The New York case, however, is inapplicable in the case at bar, because the New York case is based on New York banking law which applies to New York banks, not the National Bank Act which governs activities of national banks. *Id.* at 1994 N.Y. LEXIS 324 *17.

Furthermore, NationsBank argued that the New York case will give New York bank competitors an advantage over national banks. NationsBanks brief, S.Ct., p. 6 (July 1994). A competitive marketplace is clearly a benefit to consumers, however, and certainly not a legal cause for reversing the Fifth Circuit's opinion.

III. THE DISTRICT COURT IMPROPERLY DEFERRED TO THE COMPTROLLER'S DECISION

The Comptroller's challenged letter permitted NationsBank Securities, a subsidiary of NationsBank National Bank of North Carolina, to sell annuities. Op.

OCC, unpublished (March 21, 1990). Briefly, the Comptroller classified annuities as "primarily financial investments," Op. OCC (March 21, 1990) at 3, which national banks are authorized to sell under Section 24 (Seventh) and Section 92 of the National Bank Act. *Id.* at 3, 6, 7, 8. The District Court affirmed the Comptroller's letter, holding that "the Comptroller did not incorrectly interpret the controlling statutory provisions. His reasonable interpretation was no more than a 'permissible construction,' all that is required in order to secure this Court's deference." *VALIC v. Clarke*, 786 F. Supp. 639 at 642 (S.D. TX, Houston Div., 1991).

To determine whether deference should be given to the Comptroller's decision, both the District Court and the Fifth Circuit considered *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). The *Chevron* decision established the two issues that a Court must consider when reviewing a statutory interpretation made by an administrative agency:

(1) "Whether Congress has directly spoken to the precise question at issue;" and if not,

(2) "Whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43, 104 S.Ct. at 2781.

The plain language of Section 92 clearly limits insurance sales by national banks to towns with less than 5,000 inhabitants. *See*, § I. herein. Since this plain language evidences Congressional intent, the District Court erred in deferring to the OCC's contrary ruling. It is well-established that courts are obligated not to defer to an

administrative agency's interpretation of a statute if the interpretation frustrates the intent of Congress. *VALIC v. Clarke*, 998 F.2d at 1299, *citing, Presley v. Etowah County Commission*, 112 S.Ct. 820, 117 L. Ed. 2d 51 (1992); *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 831-32 (5th Cir. 1991); *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 847-848, 117 L. Ed. 2d 79 (1992); *BPS Guard Services Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991).

The Fifth Circuit Wrote:

> The district court erred in reaching the second step of the *Chevron* analysis because our interpretation of § 92 in *Saxon* was based on the plain language of the statute which exhibits Congress' clear intent to permit only banks in towns with less than 5,000 inhabitants to sell insurance products. *VALIC*, 998 F.2d at 1299.

IV. BANK SALES OF ANNUITIES ARE NOT INCIDENTAL BANK POWERS NECESSARY TO CARRY ON THE BUSINESS OF BANKING

Both the Federal Petitioners, OCC brief, S.Ct., pp. 39-44 (July 1994), and the Banking Petitioners, NationsBank brief, S.Ct., pp. 19 et seq. (July 1994), have argued that Section 24 (Seventh) of the National Bank Act authorizes bank sales of annuities. Section 24 (Seventh) grants national banks "all such incidental powers as shall be necessary to carry on the business of banking." National Bank Act, 12 U.S.C. § 24 (Seventh) (1994). The statute specifically lists the "necessary powers" that Congress envisioned: "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; . . . receiving deposits; . . . buying and selling

exchange, coin, and bullion; . . . loaning money on personal security; . . . obtaining, issuing, and circulating notes. . . . " *Id.*

Selling annuities was not an incidental power specified by Congress in Section 24 (Seventh). Even if one was swayed by arguments that the sale of annuities is functionally equivalent to other authorized activities, the sale of annuities certainly could not be found to be necessary to the business of banking. Traditional banking services will not be impaired because a bank is not permitted to sell annuities. The Fifth Circuit wrote that, "even conceding arguendo that the power to sell annuities would be incidental to banking, by no stretch of the imagination can that power be deemed 'necessary.' " *VALIC*, 998 F.2d 1295 at 1302.

V. THE FIFTH CIRCUIT PROPERLY REFRAINED FROM A GLASS-STEAGALL ANALYSIS

NationsBank argued that the Fifth Circuit erred "in not reaching the Glass-Steagall Act issue given its disposition of the other issues in the case." NationsBank brief, S.Ct., p. 32 (July 1994). The Glass-Steagall Act, 12 U.S.C. §§ 347a, 347b, 412 (1994), however, was never at issue in this case. The OCC letter that was the basis for this litigation never relied on the Glass-Steagall Act as authority. Op. OCC (March 21, 1990). In fact, the OCC letter stated: " . . . since we find that brokerage of fixed annuities is a permissible activity for national banks regardless of whether fixed annuities are Glass-Steagall securities, it is unnecessary at this time to determine the status of the contracts under the Glass-Steagall Act." *Id.* at 3.

CONCLUSION

Congressional intent, as evidenced by the plain language of Section 92 of the National Bank Act, 12 U.S.C. § 92, clearly dictates that national banks shall not sell insurance in cities with more than 5,000 residents. Petitioners argued that annuities are not within the scope of the Section 92 limitation. However, annuities are insurance products, sold by life insurance companies, regulated by state insurance commissioners, and possessing requisite insurance characteristics. Therefore, the Fifth Circuit properly held that national banks are not authorized to sell annuities in towns with more than 5,000 residents. Petitioners' argument that the Fifth Circuit erred because the sale of annuities is incidental and necessary to banking is unpersuasive. For these and all other reasons detailed in this brief, the National Association of Insurance Commissioners respectfully urges the Court to affirm the decision of the Fifth Circuit.

Respectfully submitted,

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Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NationsBank Of North Carolina, N.A., *et al.*,
Petitioners,
v.

Variable Annuity Life Insurance Company,
Respondent.

Eugene Ludwig, Comptroller of the Currency, *et al.*,
Petitioners,
v.

Variable Annuity Life Insurance Company,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE TOM GALLAGHER, TREASURER AND INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *ET AL.*,* IN SUPPORT OF RESPONDENT

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September 8, 1994

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BRIEF OF AMICI CURIAE TOM GALLAGHER, TREASURER AND INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *ET AL.*, IN SUPPORT OF RESPONDENT

The Commissioner of Insurance of the State of Florida (Tom Gallagher), the Attorney General (Richard Blumenthal) and the Acting Insurance Commissioner of the State of Connecticut (William J. Gilligan), the Insurance Commissioner of the State of Maryland (Dwight K. Bartlett, III), the Montana State Auditor and Commissioner of Insurance and Securities (Mark O'Keefe), the Attorney General of the State of North Dakota (Heidi Heitkamp), and the Attorney General of the State

of Rhode Island (Jeffrey B. Pine) hereby respectfully submit this brief as *amici curiae* in support of the Respondent in accordance with Supreme Court Rule 37.3. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE *AMICI CURIAE*

All of the *amici curiae* are state governmental officers or agencies engaged in the regulation of insurance underwriting and sales practices, or are the chief legal officers of their states. The regulation of insurance has been confided to the states throughout this nation's history, as currently codified in the McCarran-Ferguson Act, 59 Stat. 33-34, 15 U.S.C. §§ 1011, 1012.

The principal responsibilities of state insurance regulators are to ensure fair treatment of consumers and the solvency of insurers. To that end, we control the representations that insurance agents may make in the sales process, the contract terms that may be offered, and the sales tactics that may be utilized. We also regulate the reserves that insurance underwriters hold, and their actuarial practices, to protect their solvency and ability to meet their obligations to policyholders.

By allowing national banks to sell annuities, which are insurance under the laws of each of our states, the Comptroller's decision ignores the historic role of state insurance regulation and will harm consumers.[1] By way of comparison, the entry of banks into the credit life insurance business caused dramatic increases in the price of that product and in the use of coercive sales tactics, along with a degradation of underwriting standards that can undermine the solvency of insurers. One consumer group has called credit life insurance "The Nation's Worst Insurance Rip-Off," due largely to abusive bank practices. *See* Stephen Brobeck, *Credit Life Insurance: The Nation's Worst*

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[1] For example, it has been Florida's view that annuities are insurance for more than 140 years. An 1851 Florida statute provides that insurance companies shall have the power to write insurance, plus the power "to grant, purchase or dispose of annuities." 1851 Fla. Laws ch. 313, § 1(3).

Insurance Rip-Off (June 4, 1990) (Consumer Federation of America Report).

Because of these abuses and the potential for further abuses by banks involved in insurance matters, several state legislatures have adopted "anti-affiliation" laws, which bar financial institutions from certain insurance activities. *E.g.*, Fla. Stat. Ann. § 624.988 (1993); Conn. Gen. Stat. § 38a-775 (1993). The Comptroller's approval of national bank entry into the annuities business works to defeat that state policy and causes the same harms we have experienced in the market for credit life insurance.

The Florida Department of Insurance has comprehensive powers to protect this State's policyholders, including: (i) the licensing of insurance agents and insurers, *id.* at §§ 626.051, 626.776-.797, (ii) the regulation of the financial condition of insurers to ensure adequate assets, *id.* at §§ 625.012-.83, and (iii) control of actuarial practices, rates, and contract terms, *id.* at §§ 625.121, 627.451-.481, 627.401-.919. In 1992, the Department issued over 41,000 licenses to agents and undertook roughly 2,500 enforcement actions against agents, resulting in more than 300 adverse license actions or fines. The Department regulates more than 800 life and health insurers, and in 1992 opened 163 investigations into those companies while conducting examinations of all domestic insurers.

The Florida Insurance Department also manages the Florida Life and Health Insurance Guaranty Association, which stands behind all life insurance and annuity contracts written in the state up to $100,000 of cash benefits. *Id.* at §§ 631.001-.735. Insurer insolvency has been a significant problem in the industry in recent years. Three Florida life insurers were dissolved in 1992, the most recent year for which statistics are available. These companies had more than $600 million of insurance in place. Florida Dept. of Ins., 1993 Annual Report, at 16-17, 310 *et seq.* (1993).[2]

[2] Other insurers were driven into mergers because of their shaky financial condition.

Richard Blumenthal is the Attorney General of the State of Connecticut. William J. Gilligan is the Acting Insurance Commissioner of the State of Connecticut, and is charged with administering and enforcing the insurance laws of the State of Connecticut, including the licensing of insurers and insurance agents, Conn. Gen. Stat. §§ 38a-769 to 38a-800 (1993), and the regulation of the financial condition and insurance practices of insurers, *id.* at § 38a-775.

Dwight K. Bartlett III is the Insurance Commissioner of the State of Maryland, and is charged with administering and enforcing the insurance laws of the State of Maryland. In that capacity he is represented by the Attorney General of Maryland. Md. Ann. Code art. 48A, § 65 (1994).

Mark O'Keefe is the State Auditor and Commissioner of Insurance and Securities for the State of Montana, and has comprehensive powers to license and regulate insurers and agents in that state.

The Insurance Commissioner of the State of North Dakota is responsible to see that all of the laws respecting insurance companies are executed faithfully and must report in detail to the Attorney General of the State of North Dakota any violation of law relative to insurance companies and their officers or agents. N.D. Cent. Code § 26.1-01-03. Heidi Heitkamp is the Attorney General of the State of North Dakota. In her capacity as Attorney General, she is charged with instituting and prosecuting all actions and proceedings in favor or for the use of the State which may be necessary in the execution of the duties of a state officer, such as the Insurance Commissioner. N.D. Cent. Code § 54-12-01.

Jeffrey B. Pine is Attorney General of the State of Rhode Island, which regulates the insurance business through the Rhode Island Department of Business Regulation, which also regulates banking activities. Rhode Island law bars financial institutions from selling insurance. R.I. Gen. Laws § 27-3-47.

SUMMARY OF ARGUMENT

By rejecting the unwarranted expansion of national bank powers sought by the Comptroller of the Currency ("Comptroller"), the court of appeals preserved critical state powers to regulate insurance and protect consumers. Those state powers date from the early years of this nation, and were expressly endorsed by Congress in the McCarran-Ferguson Act. The two statutes at issue, 12 U.S.C. § 92 ("Section 92") and 12 U.S.C. § 24 (Seventh) ("Section 24(7)"), should not be interpreted in derogation of state powers.

Because insurance regulation has been reserved specifically to the states by tradition and statute, petitioners commit a serious error when they ignore state law concerning annuities and insurance. At the time of enactment of Section 92 (in 1916) and Section 24(7) (in 1863), *only* the states had any role in insurance regulation. Accordingly, any construction of those statutes must consider the law of insurance — which was exclusively state law — in 1863, in 1916, and today. State law uniformly has deemed annuities to be insurance.

Moreover, the court of appeals' decision best preserves state insurance law, and federal statutes should be construed, when possible, to preserve state law. *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989). Indeed, the Comptroller consistently has taken the view that federal law preempts all state regulation of national bank activities. If his views were to prevail in this case and on that preemption question, state regulators would lose their ability to regulate annuity activities by national banks. That outcome would leave consumers highly vulnerable to serious abuses that have accompanied bank entry into the sale of other non-bank products.

ARGUMENT

I. BECAUSE INSURANCE LAW AND PRACTICE TREAT ANNUITIES AS INSURANCE, SO DO THE STATUTES IN THIS CASE

Insurance law and practice are particularly important to the Comptroller's interpretation of the two statutory passages at the center of this case.

First, Section 92 reflects the Comptroller's view in 1916 that national banks had no power to sell the products of "fire, life, or other insurance compan[ies]" by "soliciting and selling insurance." To determine whether annuities fall within that statutory language, this Court should ask whether annuities were thought in 1916 to be a product of a "fire, life, or other insurance company" involving the sale of "insurance."

Second, Section 24(7) gave national banks the following affirmative powers:

> [A]ll such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . .

To determine whether the sale of annuities fits within any of these powers, this Court should ask whether Congress in 1863, or at any point since, had any basis for believing that the sale of annuities was covered by the powers enumerated in the 1863 legislation.

This Court must examine the historical evidence because, contrary to petitioners' suggestion, annuities are an ancient product of insurance companies, not some "cutting-edge" financial innovation of the 1990s that statutes should be stretched to reach. Annuities were familiar to legislators in 1863 and in

1916. Indeed, the annuities NationsBank wishes to sell have a classic fixed-payout option that would have been very familiar to those legislators. NationsBank Pet. App. 36a. The statutes enacted by those legislators must be construed in light of the insurance practices and the state insurance laws of those times.

A. State Insurance Law And Practice Customarily Have Treated Annuities As Insurance

For over two hundred years in this country, annuities have been considered a form of insurance by insurance companies, scholars, consumers, and state legislatures. One insurance expert cogently summarized the relationship between life insurance and annuities (William R. Vance, *Handbook on the Law of Insurance* 32 (3d ed. 1951)):

> [Every individual] must face the risk of living so short a term that his dependents will suffer want and also the risk that he may live so long that he himself will suffer want. Modern life insurance companies assume both these risks. The ordinary life policy primarily cares for the loss of support to the dependents; the endowment or insurance income policy, and the annuity, for the need of the insured in a possible protracted old age.

See Robert I. Mehr *et al.*, *Principles of Insurance* 406 (6th ed. 1976) ("The life annuity is true life insurance. It is insurance against living too long. . . ."); Kenneth Black, Jr. & Harold D. Skipper, Jr., *Life Insurance* 149 (12th ed. 1994) ("annuities are simply another type of insurance, and both life insurance and annuities are based on the same fundamental principles").

Annuities have been part of the insurance business from the beginning of the insurance industry. The very first life insurance company in England was founded in 1698 by the Mercers as "a widow's fund, an annuity scheme." 1 Joseph A. Joyce, *A Treatise on the Law of Insurance of Every Kind* 43 (2d

ed. 1917). The first chartered insurance companies in this country were established in the 1760s for the benefit of families of Presbyterian and Episcopal clergy, and involved annuities. *Id.* at 44-45. In 1812, Pennsylvania granted a charter to the Pennsylvania Company for the Insurance on Lives and Granting Annuities, " the first North American insurer organized for the sole purpose of selling life insurance and annuities to the general public." Black & Skipper, *supra*, at 53.

Certain state governments began to regulate insurance in the 1850s. Buist M. Anderson, *Anderson on Life Insurance* 12 (1991). The states' responsibility for regulating insurance was powerfully reinforced by this Court's holding in *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 183 (1869), that "[i]ssuing a policy of insurance is not a transaction of commerce" subject to federal law. After that ruling, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978).

This Court changed its view on that interstate commerce issue 75 years later in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), finding that the sale of an insurance policy occurs in interstate commerce and is subject to federal jurisdiction. Congress moved quickly to "restore the supremacy of the States in the realm of insurance" by adopting the McCarran-Ferguson Act in 1945. *United States Department of Treasury v. Fabe*, 113 S.Ct. 2202, 2207 (1993). That statute declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," 15 U.S.C. § 1011, and then provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede" any state insurance law "unless such Act specifically relates to the business of insurance." *Id.* at § 1012(b).

This Court has stressed that the McCarran-Ferguson Act was adopted because "Congress clearly remained concerned about the inroads the Court's decision [in *South-Eastern Under-*

writers Ass'n] might make on the tradition of state regulation of insurance." *SEC v. National Sec., Inc.*, 393 U.S. 453, 458 (1969). Indeed, Congress declared "expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430 (1946).

At no time, however, did Congress or any state take any step suggesting that annuities may not be regulated by the states as insurance. As the court of appeals pointed out in this case, all fifty states currently regulate annuities as an insurance product. NationsBank Pet. App. 11a.

The historical and true character of annuities as insurance was acknowledged in *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959). In that ruling, the Court determined that for the purpose of disclosures under the Securities Act of 1933, certain variable annuities should be deemed securities. Justice Brennan's influential concurring opinion stressed, however, that "the granting of annuities has been considered part of the business of life insurance." *Id.* at 80-81. The Court also found that fixed annuities are insurance and require no securities disclosures. *Id.* at 75-81. That conclusion was reinforced by the holding in *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 206 (1967), that the pay-out portion of even a variable annuity involves "conventional insurance provisions, and thus [is] beyond the purview of the SEC."

B. In 1863 And 1916, Annuities Were Considered Insurance

The general understanding of the nature of annuities when Congress acted in 1863 and 1916 is very important. For example, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 227 (1979), construed the phrase "business of insurance" in the McCarran-Ferguson Act by looking at the "contemporary

perception" of what constituted "providing insurance" when the law was enacted. That "contemporary perception," the Court wrote, "is highly significant in ascertaining congressional intent." *Id.*

Petitioners have presented no evidence that before the adoption of the National Bank Act in 1863, annuities were considered not to be insurance; indeed, the evidence is all to the contrary. In his 1854 *Treatise on the Law of Fire and Life Insurance*, Joseph K. Angell described immediate, deferred and survivorship annuities as "official forms" of life insurance, and discussed annuity transactions as a primary feature of the life insurance business. Joseph K. Angell, *Treatise on the Law of Fire and Life Insurance* xi, 303-04 n.2, (Boston, Little, Brown & Co. 1854). J.H. James wrote in 1868 that life insurance had two primary forms: ordinary life policies and the issuance of annuities. J.H. James, *A Practical Treatise on Life and Fire Assurance; Annuities and Reversionary Sums; and Leases for Terms and For Lives* 24, 28 (London, Doughty & Co. 1868).

Contemporaneous state law also classified granting annuities as one of the activities of life insurance companies. For example, New York's first general law for regulating insurance companies described them as having the power to "make insurance upon the health or lives of individuals and every insurance appertaining thereto or connected with health or life risks, and to grant, purchase, or dispose of annuities." 1849 N.Y. Laws ch. 308, § 1.[3] *See* 1851 Fla. Laws ch. 313, § 1(3); 1868 Md. Laws ch. 471, § 99; 1869 Mo. Laws ch. 27, § 1; 1850 Wis. Laws ch. 232, § 1.

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[3] The federal petitioners stress that two of the three members of the House subcommittee that originated the 1863 statute were "New York bankers." Fed. Petitioners Br. at 18 n.6. Presumably, such banker-statesmen also knew that annuities were part of the insurance business under New York law.

Petitioners also stress a recent finding by the New York Court of Appeals that even though New York statutes define annuities as insurance, "the weight of authority" holds that annuities are *not* insurance. *New York State Ass'n of*

By 1916, when Congress adopted Section 92, the evidence that annuities were considered only to be insurance is even stronger, with more states specifically authorizing insurance companies to sell annuities. *E.g.*, 1915 Cal. Stat. ch. 768, § 1 (annuities are form of life insurance); 1914 N.J. Laws ch. 88, § 1 (insurance corporations empowered to sell annuities); 1909 Okla. Sess. Laws ch. 21, § 3 (insurance corporations may issue annuities). Indeed, the great weight of authority held that annuities were insurance. *E.g.*, William A. Kerr, *The Law of Insurance* 13, 888 (1902) (annuities are insurance contracts governed by insurance laws); Lester W. Zartman, *Life Insurance* 277-280 (1914) (categorizing annuities as life insurance products).

Throughout the relevant period, the prevailing understanding of annuities was captured by the leading insurance authority of the time, Prof. Solomon Huebner of the Wharton School of Finance, also President of the American College of Life Underwriters, in his textbook (*Life Insurance* 155 (3d ed. 1935) (emphasis added)):

> The purpose of the annuity, it is seen, is to protect against a hazard — the outliving of one's income — which is just the opposite of that confronting a person who desires life insurance as protection against the loss of income through premature death. Technically, however, the two types of contracts are closely related to each other, since the cost of both is computed on the basis of similar data and principles. *Sight should not be lost of the fact that annuities are simply another important means of insurance.*

Life Underwriters v. New York State Banking Dep't, 632 N.E.2d 876 (N.Y. 1994). We cannot contrive a coherent explanation of the New York court's surprising decision to read the state statute out of existence, a ruling that reflects an unusual view of the proper powers of the judiciary.

In the face of this powerful historical evidence, petitioners' erroneous constructions of Section 92 and Section 24(7) cannot be maintained. There is no basis for concluding that Congress in 1863 had any doubt that annuities were an insurance activity, or that Congress had any intent to give national banks any insurance powers. Similarly, Congress in 1916 unquestionably understood that "insurance" in Section 92 included annuities, which were solely written by "life . . . insurance companies."

Petitioners argue that this historical evidence is irrelevant because some annuity products are currently structured in a manner different from the annuities sold in 1863 and 1916. That contention has little force since the NationsBank product at issue in this case includes a simple fixed annuity option, which is identical to the annuities sold in 1863 and 1916, and then understood to be insurance.

In any event, petitioners incorrectly argue that the "modern annuities market" includes annuity options that were undreamt of in the nineteenth century. *See* Fed. Br. at 33-35. Petitioners argue that these supposed "modern" innovations include "refund" annuities that return the purchaser's principal at time of death, or deferred annuities with withdrawal options. But in 1868, J.H. James carefully described both "deferred annuities" and annuities in which "an agreed portion of the deposit is returned to the representatives of the annuitant on death." James, *supra*, at 25. In fact, James described both types of annuities as "examples of the more prominent features in Life Assurance now introduced into general use." *Id.* at 24. Petitioners' supposedly modern innovations in annuities are at least 125 years old.

C. Current State Insurance Law Regulating Annuities

Today, the marketing practices and financial conditions of all insurers are regulated by the states. That includes the companies' sale of annuities as illustrated by the following regulatory synopses of state laws within the purview of the amici curiae.

1. Florida

Florida recognizes annuities as insurance in a variety of ways. The very definition of "insurer" includes an indemnitor, surety, or contractor entering into annuity contracts, § 624.03, Fla. Stat. Ann. (1993), by reason of which the insurer is subject to the Department's regulation. *Id.* at § 624.33. The definition of "life insurance" includes "...the granting of annuity contracts, including, but not limited to, fixed or variable annuity contracts...." *Id.* at § 624.602. Similarly, the definition of "life insurer" means an "insurer writing ... annuity contracts, variable contracts, or any of such types of contracts." *Id.* at § 626.780. An "ordinary-variable contract class insurer" includes the issuance of "annuity contracts providing for payments or values which vary directly according to investment experience." *Id.* at § 626.781. Once a life insurer is granted a certificate of authority, *id.* at § 624.401(1), it may grant annuities. *Id.* at § 624.406(1).

In Florida, no life insurer may deliver or issue an annuity contract except through a Florida licensed insurance agent. *Id.* at § 624.428(1). Florida insurance premium taxes are assessed on annuity premiums. *Id.* at § 624.509(1),(8). When Florida seeks to determine the financial condition of an insurer, it includes as assets its "annuity contracts and accrued interest thereon," *id.* at § 625.012(3)(4); liabilities include unpaid losses and claims on annuity contracts. *Id.* at § 625.041(2). The "Standard Valuation Law" requires that the Department every year value the annuity contracts of "every life insurer doing business in this state...." *Id.* at § 625.121(2). The actuarial analyses required to valuate policies and contracts is complex and varies depending on the date the annuities were issued. *Id.* at § 625.121(5)-(7),(9),(12).

The examinations for a license to be a life insurance agent must cover variable annuities. *Id.* at § 626.241(3). Unfair or deceptive acts or practices in insurance sales were addressed in a comprehensive fashion in 1959 when Florida passed what is

now Part X of Chapter 626, Florida Statutes, the "Unfair Insurance Trade Practices Act." *Id.* at § 626.951(2); ch. 59-205, § 379, Laws of Fla. One provision of the Act addresses problems encountered in Florida when financial institutions market insurance. This "anti-affiliation" statute prohibits financial institutions from engaging in "insurance agency activities."

Florida requires that insurance policies, including annuity contracts, must be filed with the Department for approval. *Id.* at § 627.410. The forms are reviewed for compliance with statutes which either explicitly reference annuity contracts, or include them under the generic statutory definition of life insurance. Annuity forms may be disapproved under this section whenever they contain provisions which are misleading, ambiguous, or whenever the benefits provided under the contract are not reasonable, in accordance with reasonable actuarial techniques, in relation to the premiums. *Id.* at § 627.411. By statute, a number of specific contract provisions must be included in annuity contracts. *Id.* at §§ 627.464-.471.

Insurer solvency is a matter of grave concern to state insurance regulators, and this is particularly so when banking interests seek to market insurance products. Florida has established the Florida Life and Health Insurance Guaranty Association "*to protect* policyowners, insureds, beneficiaries, *annuitants*, payees, *and assignees of* life insurance policies, health insurance policies, *annuity contracts* and supplemental contracts ... *against the failure of an insurer* issuing such policies or contracts ...." *Id.* at §§ 631.712 and .715(1) (emphasis added). The Association maintains three accounts, one being "[t]he annuity account." *Id.* at § 631.715(2)(a)(3).

2. Maryland

Similarly, annuities have been treated as fully regulated insurance products in the State of Maryland. Annuities are defined in Maryland's Insurance Code as "all agreements to make periodical payments where the making or the continuance

of all or some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life...." Md. Ann. Code art. 48A, § 65 (1994 Repl. Vol.). As an insurance product, an annuity may only be sold by a licensed insurance agent or broker. *Id.* at §§ 165-67.

The financial condition of all insurers is regulated. *Id.* at § 75, *et. seq.* Indeed, the Maryland Insurance Commissioner annually values the reserve liabilities for all outstanding life insurance policies and annuity business in the state. *Id.* at § 83. In case of insolvency of the insurance company, benefits under annuity contracts are guaranteed by the Life and Health Insurance Guaranty Corporation. *Id.* at § 520, *et. seq. See also Board of Trustees of Md. Teachers & State Employees Supplemental Retirement Plans v. Life & Health Ins. Guaranty Corp.*, 335 Md. 176, 642 A.2d 856 (1994). In addition, a tax is assessed against the insurer on premiums for annuity contracts. *Id.* at § 632.

3. Montana

The Montana State Auditor's Office has comprehensive powers to protect insurance policyholders and consumers and purchasers of variable annuities under the Securities Law of the State of Montana, including: (1) the licensing of insurance agents and insurers, Ch. 17, Title 33, Mont. Code Ann. (MCA), (2) the regulation of the financial condition of insurers to ensure adequate assets, Ch. 2, Title 33 MCA, (3) control of actuarial practices, rates, and contract terms, Chs. 15 and 16, MCA, and (4) regulation of variable annuities under Section 33-10-103(19), MCA. The Montana Auditor's Office licenses more than 650 life and health insurers and has issued over 17,500 licenses to agents. In 1993, it took action in 250 administrative cases involving insurance companies and agents.

The Montana State Auditor's Office presently licenses approximately 20,000 persons as securities brokers, agents, and dealers, some of which are involved in the sale of variable annuities. State regulation attempts to ensure that the consum-

ers of such products are aware of what they are purchasing and can make a reasoned decision. The State Auditor's Office takes approximately 15 administrative actions per year in the securities area.

The Montana State Auditor's Office also assists the Montana Life and Health Insurance Guaranty Association, which stands behind all life insurance and annuity contracts written in the state up to $300,000 of cash benefits for life insurance and $100,000 of annuity benefits. The Association is presently involved in a major case of insolvency in Montana.

Because the Montana State Auditor is the Commissioner of both Insurance and Securities of the State of Montana, he is sensitive to the fact that banks deal mainly with investment risk and some expense risk. Banks are never liable to customers for more than the amount of money they invested plus the interest earned on the money. The sale of annuities requires that premiums and benefits be tied to a policyholder's expected mortality and other risks that are free of regulation. If banks were allowed to market such insurance, serious problems would arise for Montana consumers and would potentially undermine the solvency of banks, the very institutions which, it is argued by petitioners, are supposed to benefit from such a marketing opportunity.

II. THE COMPTROLLER SEEKS TO OVERRIDE STATE REGULATORY POLICIES, WHICH WOULD INJURE CONSUMERS

This Court has insisted that unless Congress specifically states that it intends to supplant state regulatory systems, statutes should not be read to interfere with "the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *see Massachusetts v. Morash*, *supra*, 490 U.S. at 119. The Comptroller, however, seeks to supersede all state regula-

tion of annuities based on a broadly expansive reading of Section 24(7), and an implausibly narrow reading of Section 92. In so doing, the Comptroller would risk exposing consumers to the abuses that have resulted from bank entry into non-bank businesses.

Notably, the Comptroller seeks to incur those risks to vindicate a single "public" policy: to "provide additional income for the banks." Fed. Petitioners' Br. at 11. That is hardly a goal warranting the sacrifice of principles of federalism, consumer protection, and sound statutory construction.

A. The Comptroller Seeks The Total Destruction Of State Regulation

In response to a national bank's proposal to sell annuities, the Comptroller recently announced that his interpretation of Section 24(7) preempts the Connecticut state requirements for the licensing of insurance agents as well as that state's prohibition on bank sales of insurance. OCC Interpretive Letter No. 623, *reprinted in* [1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,505 at 71,612 (May 10, 1993), *appeal pending sub nom. Shawmut Bank Connecticut, N.A. v. Googins*, No. 3:94CV14 (D. Conn.). The Comptroller's attempt to preempt state insurance regulation was upheld in *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24 (E.D. Ky. 1992), *appeals pending* Nos. 92-6300, 92-6331 (6th Cir.), though it was rejected in *Barnett Banks, N.A. v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), *appeal pending* No. 93-3508 (11th Cir.).

At issue in each of those cases is a state "anti-affiliation" statute, which bars financial institutions from engaging in insurance activity. The Florida state courts have upheld that state's anti-affiliation law because the "Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance." *Production Credit Ass'n of Fla. v. Department of Ins.*, 356 So. 2d 31, 32 (Fla. Dist. Ct. App. 1978). *See also Glastonbury Co. v. Gillies*, 209 Conn.

175, 182, 550 A.2d 8 (1988) (citing legislative history of Connecticut anti-affiliation statute at Conn. Jt. Standing Comm. Hearings, Ins. and Real Estate, 1973 Sess., at 181-85). These potential abuses include "coercion, unfair trade practices, and undue concentration of resources." *Glendale Fed. Sav. & Loan Ass'n v. State Dep't of Ins.*, 587 So. 2d 534, 537 (Fla. Dist. Ct. App. 1991).[4]

These legislative policies were considered by the district court in *Barnett Banks*, which expressed concern that bank insurance activities could imperil insurer solvency and consumer protection. On the solvency issue, the court noted (839 F. Supp. at 842):

> [I]n order [for the bank] to make a profit in automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in insolvency of the insurer.

The federal court found the consumer protection threat to be equally clear (*id.*):

> [T]he loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

If the Comptroller prevails in this case and his policy prevails in the preemption cases, the state regulatory protection for

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[4] Seventeen states have "anti-affiliation" laws. *See* Appendix A (listing statutes).

consumers and the ability adequately to provide for insurer solvency will be destroyed.

B. Bank Abuses In Selling Non-Bank Products

Experience supports the concern of state legislatures over bank abuses in the sale of non-bank products. Those abuses have been found in bank sales of credit life insurance, annuities, and securities. Indeed, such abuses recently have been alleged concerning the Florida operations of petitioner NationsBank.

Credit life insurance provides the greatest experience with bank sales of non-bank products, and the abuses have been appalling. The 1990 study by the Consumer Federation of America found that credit life insurance is "by far the most overpriced insurance purchased by many consumers." Steven Brobeck, *Credit Life Insurance, supra*, at 1. The study found that banks mislead borrowers about the need for such insurance and coerce them into purchasing it at supracompetitive prices. *Id.* at 3.

The study also found that because banks effectively control the purchasers of credit life insurance (the borrowers), the banks can force "reverse competition" by squeezing insurers to pay ever-higher commissions to the banks. In insurance parlance, the "loss ratio" describes how much of each premium is retained to cover losses by policyholders, with the balance going for commissions and other administrative expenses. Ordinarily, a loss ratio of 75% "allows both insurers and their lender agents to earn a reasonable profit." *Id.* at 2. The Consumer Federation study found, however, that the loss ratio for credit life insurance in Florida was only 37% in 1988, because banks were able to demand such massive commissions, leaving very low reserves to cover the risks. *Id.* Such blatant gouging by banks undermines the solvency of insurers, thereby placing consumers' coverage at risk.

Our experience in Florida is consistent with that study. The price of credit life insurance has risen steadily; the loss ratios have shifted profoundly in the banks' favor and thereby have

undermined insurer solvency; and many consumers have reported coercive sales tactics by banks.

The problem of bank coercion of customers also has arisen in a major Florida bank's sales of annuities under a "lobby-lease" arrangement.[5] Bank employees were paid a "bounty" of at least $5.00 for every bank customer who made an appointment with the insurance agent, who was deceptively titled a Tax Advantage Account Specialist. The agency sold annuities that were structured so the purchaser did not actually acquire the annuity that he or she thought was being purchased; rather, the consumer bought only an interest in a trust managed by the bank, which then bought annuities payable to the trust. The bank received one-third of the insurance commission, plus fees for managing the trust, and was liable only for gross negligence. *Department of Insurance and Treasurer v. James Mitchell and Company, et al.*, No. 93-2442 (Fla. Div. of Admin. Hearings, Aug. 30, 1994) (Recommended Order) (detailing "deceptive and misleading" marketing program).

A further consumer protection issue is the erroneous belief of many consumers that annuities purchased at banks are federally-insured. A recent survey sponsored by the American Association of Retired Persons found that out of 445 individuals whose banks sold annuities, 40% thought the annuities were federally insured, and 46% did not know whether they were or not. AARP, *Bank Investment Products Survey* 9-10 (Jan. 1994). This widespread misunderstanding is, in our experience, often encouraged by the bank in a lobby-lease situation, and causes consumers to misunderstand the risks associated with the products they are purchasing.

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[5] Under a "lobby-lease" arrangement, the bank rents space in its lobby to an insurance agency, which is supposed to offer insurance products on a completely independent basis. The arrangement is legal in Florida so long as the insurance operation is conducted independently of the bank. We have found, however, that the banks often blur the line between bank and insurance agency, and many consumers believe they are buying insurance from the bank.

Finally, several complaints filed this summer include allegations concerning NationsBank which are consistent with these experiences. *See NationsBank Accused of Deceptive Tactics*, Wash. Post, B1-B2 (July 29, 1994) (Appendix B); *NationsBank Under Fire for Alleged Staff Bonuses On Brokerage Referrals*, American Banker, 1, 8 (Aug. 3, 1994) (Appendix C). According to an administrative complaint filed by three former NationsBank brokers, (i) bank employees received cash bonuses for "steering" bank customers to the higher-risk brokerage department, (ii) bank customers were discouraged from investing in insured certificates of deposit, but were not told that certain recommended securities were not insured, (iii) bank employees "routinely" gave the brokers confidential information about the customers' accounts, and (iv) the bank intentionally blurred the distinction between the bank and the brokerage operation. App. B. Another report stated that NationsBank tellers received a 5 percent commission on all purchases of securities by customers they referred, a policy that was replaced by a $10.00 "bounty" for referrals resulting in sales. App. C.

All of these factors demonstrate the wisdom of preserving state regulation of insurance products (*e.g.*, Appendix D) against the Comptroller's assault. Indeed, the Comptroller's assertion that bank sales of annuities create no solvency issues for banks (NationsBank Pet. App. at 47a-48a) has a harsh irony for state insurance regulators. Solvency issues will not be raised for the banks, but will arise for the insurers and insurance regulators who must cope with the banks' market power. If national banks are permitted to sell annuities to their captive customers, the banks will quickly have sufficient market power to force insurers to offer riskier products with greater commissions for banks.[6] This Court should not embrace such a negative policy outcome based on petitioners' novel and unsupported statutory constructions.

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[6] This risk is not theoretical since two major annuity underwriters failed in the early 1980s (Baldwin-United and Charter Security Life), while three other insurers (First Executive, First Capital Holding and Guarantee Security Life) failed in recent years.

CONCLUSION

For all of the foregoing reasons, and the reasons included in the Brief of Respondent, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

State Anti-Affiliation Statutes

Alaska	Alaska Banking Code tit. 6, § 06.05.272 (1993)
Ark.	Ark. Code Ann. § 23-64-203(b) (1987)
Colo.	Colo. Rev. Sat. Ann. § 10-2-221(2) (West 1994)
Conn.	Conn. Gen. Stat. Ann. § 38a-775 (West 1994)
Fla.	Fla. Stat. Ann. § 626.988 (West 1994)
GA	Ga. Code Ann. § 33-3-23 (1993)
IL	Ill. Ann. Stat. ch. 215, para. 499.1(e) (Smith-Hurd 1994)
LA	La. Rev. Stat. Ann. tit. 6, § 121-B(2) (West 1994)
ME	Rev. Stat. Ann. tit. 24-A § 1514-A (West 1993)
MA	Mass. Gen. Laws Ann. ch. 175, § 174(E) (West 1994)
MI	Mich. Comp. Laws Ann. §§ 500.1242, .1207(3), .1207(5), .2077(a) (West 1994)
NM	N.M. Stat. Ann. § 59A-12-10 (1993)
NY	N.Y. Insurance Law § 2501 (McKinney 1994)
Ohio	Ohio Rev. Code Ann. § 3911.01 (Anderson 1993)
PA	Pa. Stat. Ann. tit. 40, § 281(b) (1994)
R.I.	R.I. Gen. Laws § 27-3-46 (1993)
VT	Vt. Stat. Ann. tit. 8, § 4811(a)

APPENDIX B

"NationsBank Accused of Deceptive Tactics- Former Brokers Cite Securities Sales Practices" (The Washington Post - July 29, 1994)

NEW YORK, July 28 - Three former NationsBank brokers are accusing the bank of deceptive sales practices that steered bank customers to its brokerage department, discouraged savers from investing in insured deposits and routinely gave confidential bank customer information to its brokers in order to solicit them to buy securities.

The claim, filed today with the National Association of Securities Dealers (NASD), comes as more and more commercial banks enter the securities business. Legislators and regulators have expressed concern that many bank customers fail to understand the greater risks of brokerage purchases compared with bank deposits.

Ellison Clary, a spokesman for NationsBank Corp. and its brokerage unit, NationsSecurities, said, "We vigorously deny the claims and feel that they are unfounded. We think the procedures we have in place conform not only to the letter of the securities and banking laws but also with the spirit of disclosure and fair dealing that is inherent in those laws."

He said that this is the first time such allegations have been made against the bank, but he would not respond to the specific claims.

The former employees, who worked out of three different Florida branches of the bank, say that they were fired or quit last month after witnessing the sales practices at NationsBank's brokerage subsidiary.

Charlotte, N.C.-based NationsBank, the biggest bank company operating in the Washington area, offers brokerage serv-

ices in 77 of its 386 branches in Maryland, the District and Northern Virginia.

"I could no longer sell investment products that I didn't think were good for the clients," said Catherine B. Hovis, one of the three former employees, in an interview. She resigned last month as a NationsBank broker in Palmetto, Fla. "There was a total lack of supervision. Second, it was an operational nightmare. All I am doing is protecting my good name and everything I have worked for."

Clary said Hovis's accusations were "groundless."

Banks often sell mutual funds and securities in branches that bear the seal of the Federal Deposit Insurance Corp., which can lead customers to false assumption that the securities are FDIC-insured or protected against loss. A recent study by the Securities and Exchange Commission concluded that 60 percent of people who buy mutual funds from banks think their investment is safeguarded by the FDIC.

In order to offer brokerage services, NationsBank agreed last year to certain conditions set by the Office of the Comptroller of the Currency, which regulates federally chartered banks, that require the bank to separate the brokerage operation.

A senior attorney at the OCC said the case is unusual and that bank-brokerage complaints have not been widespread.

NationsBank and OCC spokesmen say that they are discussing the former employees' allegations. If warranted, the OCC could initiate a formal legal action that could lead to revocation of its approval of NationsBank's brokerage operation.

The NASD, which regulates the practices of brokers, could refer the complaint to its enforcement division as part of an arbitration hearing. The NASD can fine a company and bar or suspend individuals or firms from the business.

The brokers are seeking millions of dollars in damages for being forced out of their jobs after complaining about the practices. The allegations surfaced last month when one of the three former brokers filed a lawsuit against the bank for wrongful dismissal.

The former brokers claim that NationsBank:

- Did not tell customers that bank employees were given special cash bonuses for "steering" bank customers to the brokerage department.
- Discouraged bank customers from investing in "CDs, savings accounts and other similar investment at NationsBank, which would have been insured against loss of principal" by the FDIC or the bank. Instead, customers were advised to invest in products sold by the brokerage unit. They were not told "that these products were actually uninsured securities."
- "Routinely" gave to its brokers confidential bank customer account information that was used "to solicit NationsBank bank customers to purchase securities ... Such confidential information was disclosed without the knowledge or permission" of the bank's customers.
- Intentionally blurred the distinction between the bank and the brokerage. Brokers were based in the bank's branches and "were permitted virtually unrestricted access ... so that their activities appeared (and were) completely integrated with the operations of the bank." This "created substantial customer confusion" that made it easier to sell securities to bank customers.
- Misled customers by "using names and color schemes which were confusingly similar to the name and the distinctive color scheme [red, white and blue] of the bank." The result was that "customers thereby were led to believe

> that the investments purchased were guaranteed by or protected by NationsBank or by the FDIC."

The complaint says, "These practices cannot be blamed on one or two rogue individuals, but were and are systemic practices of ... NationsBank so as to unlawfully utilize securities professionals as mere conduits to trick risk-averse bank customers."

APPENDIX C

"NationsBank Faces Heat on Referrals To Brokerage-Branch Staff Allegedly Got Improper Bonuses" (American Banker - August 3, 1994)

NationsBank Corp. has come under fire for an alleged practice, said to have been abandoned in January, of paying hefty cash bonuses to branch employees who referred business to its brokerage affiliate.

Two pending lawsuits charge that the North Carolina-based company violated banking and securities rules by paying a 5% share of brokerage commissions to branch employees.

The practice was confirmed by a current employee of the brokerage affiliate, NationsSecurities, who asked not to be named. The company is a joint venture of NationsBank's lead banking unit and Dean Witter, Discover & Co.

A NationsBank spokesman declined to comment on the incentives, which were disclosed in an arbitration claim filed against NationsSecurities last month by 18 brokers.

Similar disclosures also were made in a separate suit by three other brokers.

But the spokesman, Ellison Clary, reiterated statements the bank has made over the past month that NationsSecurities abides by both "the spirit and the letter" of baking and securities regulations.

The statements came in response to suits by a handful of former brokers and customers claiming that NationsSecurities is systematically misleading customers about investments.

Several brokers not involved in the suits have taken exception to the claim that customers are misled, as has the bank, which vigorously denies the charge.

But the brokers were in consensus in describing the incentive program. If it existed, it would appear to belie the claim that NationsSecurities was in full compliance with the rules.

"Banks in general are being very careful not to cross any lines," said Glen Casey, a consultant with Cerulli Associates in Boston, which advises banks about marketing investments.

"This case with Nations is a bit surprising if, in fact, the allegations are true."

According to the arbitration claim for the 18 brokers, NationsBank had adopted the commission-sharing arrangement before the formation of NationsSecurities in 1992.

In the program, tellers and customer service reps were taught to identify and refer prospects to branch-based brokers. The suit said that one unnamed branch employee in Texas got a $3,000 bonus for a referral that resulted in a $1.5 million investment. Another branch employee was said to have gotten more than $2,000 from a referral that resulted in a $1 million transaction.

In January, the bank changed the payout to a flat $10 fee for referrals that led to sales.

Since last year, federal banking guidelines have barred banks from paying branch employees bonuses that are contingent upon the sales of investments.

Instead, bonuses can be paid only for referrals, whether or not a sale is made. These rules are intended to help separate a bank's traditional business from its brokerage business. They are also meant to keep unqualified people from selling investments. Likewise, the National Association of Securities Dealers prohibits brokers from splitting commissions with people who don't have securities licenses. So do rules in some states in which NationsBank operates, including Florida, Georgia, North Carolina, and Virginia, according to the arbitration claim.

The suit said that NationsBank alluded to these concerns in a memo it distributed that listed two reasons for dropping the arrangement.

One was that the plan didn't compensate employees for meeting "sales objectives."

The other was that "OCC and NASD regulations" say such incentives must "be normal and have no bearing on commissions generated."

Robert F. Miailovich, a senior regulator at the Federal Deposit Insurance Corp., said that if a bank was sharing commissions, regulators would likely ask it to change the practice. If the bank changed, it would likely face no further sanctions.

He could not say if any such discussions had been held with NationsBank. A Securities and Exchange Commission official who wished not to be identified said banks are excluded from the commission-sharing restrictions in the securities dealers group's rules.

APPENDIX D

CHAPTER 4-150
LIFE AND HEALTH ADVERTISING REQUIREMENTS

* * *

PART II ADVERTISING OF LIFE INSURANCE AND ANNUITY CONTRACTS

4-150.101	Purpose.
4-150.102	Applicability.
4-150.103	Definitions.
4-150.104	Method of Disclosure of Required Information.
4-150.105	Form and Content of Advertisements.
4-150.106	Disclosure Requirements for Annuity Contract Advertisements.
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4-150.111	Use of Statistics.
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4-150.113	Jurisdictional Licensing and Status of Insurer.
4-150.114	Identity of Insurer.
4-150.115	Group or Quasi-Group Implications.

* * *

PART II ADVERTISING OF LIFE INSURANCE AND ANNUITY CONTRACTS

4-150.101 Purpose. The purpose of these rules is to provide prospective purchasers with clear and unambiguous statements in the advertisement of Life Insurance and Annuity Contracts, and to assure the clear, truthful and adequate disclosure of the benefits, limitations and exclusions of policies sold as Life Insurance and Annuity Contracts. This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of Life Insurance and Annuity Contracts to assure that product descriptions are presented in a manner which prevents unfair, deceptive and misleading advertising and is conducive to accurate presentation and description of Life Insurance and Annuity Contracts to the segment of the insurance buying public through the advertising media and material used by insurance agents and companies.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641 FS. History-New 9-1-73, Formerly 4-35.01, Amended 6-12-88, Formerly 4-35.001.

4-150.102 Applicability.

(1) These rules shall apply to any Life Insurance Policy and Annuity Contract "advertisement," disseminated in this State which the insurer knows or reasonably should know is intended for presentation, distribution or dissemination in this State, when such presentation, distribution or dissemination is made either directly by an insurer or indirectly on behalf of an insurer, by an agent, broker, producer or solicitor or any other person who has either actual or apparent authority to act on behalf of the insurer; provided the insurer shall not be responsible for advertisements that are published in violation of written procedures or guidelines of the insurer. Further, provided, that in variable contracts where disclosure requirements are established pursuant to Federal regulation, these rules shall be interpreted so as to minimize or eliminate conflict with such Federal Regulation wherever possible.

(2) Every insurer shall establish and at all times maintain a system of control over the content, form and method of dissemination of all its Life Insurance and Annuity Contract advertisements. All such advertisements, regardless of by whom written, created, designed or presented, shall be the responsibility of the insurer(s) benefiting directly or indirectly from their dissemination; provided the insurer shall not be responsible for advertisements that are published in violation of written procedures or guidelines of the insurer.

(3) Advertising materials which are reproduced in quantity shall be identified by form numbers or other identifying means. Such identification shall be sufficient to distinguish an advertisement from any other advertising materials, policies, applications or other materials used by the insurer.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.02, Amended 6-12-88, Formerly 4-35.002.

4-150.103 Definitions. For the purpose of these rules, the terms below are defined as follows:

(1) An "Advertisement" includes:

(a) printed and published material, audio visual material and descriptive literature used by or on behalf of an insurer in direct mail, domestic or regional publications which are distributed for viewing in Florida (i.e. newspapers, magazines, radio scripts or TV scripts), billboards and similar displays; and

(b) descriptive literature and sales aids of all kinds issued by an insurer, agent, producer, broker, or solicitor or any other person who has either actual or apparent authority to act on behalf of the insurer for presentation to members of the insurance buying public, including but not limited to, circulars, leaflets, booklets, depictions, illustrations, form letters, and lead-generating devices as herein defined; and

(c) prepared sales talks, presentations and material for use by agents, brokers, producers and solicitors, announcers, spokespersons, celebrities, and other persons, whether prepared by the insurer or the agent, broker, producer, or solicitor, announcer, celebrity, or any other person who has either actual or apparent authority to act on behalf of the insurer; and

(d) advertising material included with a policy when the policy is delivered and material used in the solicitation of any policy.

(2) The definition of "Advertisement" does not include:

(a) material to be used solely for the training and education of an insurer's employees, agents, or brokers;

(b) material used exclusively in-house by insurers;

(c) communications within an insurer's own organization not intended for dissemination to the public;

(d) individual communications of a personal nature with current policyholders regarding existing coverage other than

material urging such policyholders to renew, increase or expand coverages;

(e) correspondence between a prospective group policyholder and an insurer in the course of negotiating a group contract;

(f) court approved material ordered by a court to be disseminated to policyholders; or

(g) a general announcement from a group policyholder to eligible individuals on an employment or membership list which may include a brief description of coverage and is primarily a notification that a contract or program has been written or arranged; provided, the announcement must clearly indicate that it is preliminary to the issuance of a booklet, pamphlet, brochure or other similar paper preliminary to coverage by the insurer.

(3) "Application" means the form which must be filled in by the person seeking to effectuate an insurance policy.

(4) "Application Period" also includes any enrollment period.

(5) "Certificate" means any certificate issued under a group Life Insurance and Annuity Contract which certificate has been delivered or issued for delivery in this State.

(6) "Exception" means any provision in a policy whereby coverage for a specified hazard is entirely eliminated; it is a statement of a risk not assumed under the policy.

(7) "Institutional Advertisement" means an advertisement having as its sole purpose the promotion of the readers', viewers' or listeners' interest in the concept of Life Insurance and Annuity Contracts or the promotion of the insurer as a seller of Life Insurance and Annuity Contracts.

(8) "Insurer" includes any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds,

fraternal benefit society, and any other legal entity which is defined as an "insurer" in the Insurance Code of this State.

(9) "Invitation to Contract" means an advertisement which is neither an institutional advertisement nor an invitation to inquire.

(10) "Invitation to Inquire" means an advertisement having as its objective the creation of a desire to inquire further about life insurance and annuity contracts, which advertisement is limited to a brief description of coverage and which shall contain a provision in the following or substantially similar form:

This policy has (exclusions) (limitations) (reductions of benefits) (terms under which the policy may be continued in force or discontinued). For costs and complete details of the coverage call (or write) your insurance agent or the company. [whichever is applicable].

A "brief description of coverage" in an invitation to inquire must be limited to a brief description of the loss for which benefits are payable but may contain the dollar amount of benefits payable, and/or the period of time during which benefits are payable. An invitation to inquire may not refer to cost or rates. As with all life insurance and annuity contract advertisements, an invitation to inquire may not:

(a) employ devices which are designed to create undue anxiety;

(b) exaggerate the value of the benefits available under the advertised policy;

(c) otherwise violate the provisions of these rules.

(11) "Lead Generating Device" means any communication directed to the public which, regardless of form, content, or stated purpose, invites or elicits a response on the subject of insurance and thereby results in the compilation or qualification of a list containing names of or other personal information

regarding persons who have expressed a specific interest in an insurance product or coverage and which is to be used to solicit residents of this State for the purchase of Life Insurance and Annuity Contracts or other insurance.

(12) "Life insurance policy and annuity contract" includes any policy, plan, certificate, contract, agreement, statement of coverage, rider or endorsement which provides for life insurance or annuity contract benefits, or a combination thereof.

(13) "Limitation" means any provision which restricts coverage under the policy other than an exception or a reduction.

(14) "Person" means any natural person, association, organization, partnership, trust, group, discretionary group, corporation or any other entity.

(15) "Reduction" means any provision which reduces the amount of the benefit; this term includes a situation where a risk of loss is assumed, but payment upon the occurrence of such loss is limited to some amount or period less than would be otherwise payable had such reduction not been used.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.03, Amended 6-12-88, 2-26-92, Formerly 4-35.003.

4-150.104 Method of Disclosure of Required Information. All information required to be disclosed by these rules shall be set out conspicuously, in the same type size as that used in the body of the advertisement, and in close conjunction with the statements to which such information relates, or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion, or intermingled with the context of the advertisement so as to be confusing or misleading.

Specific Authority 624.308 FS. Law Implemented 626.9541(1) FS. History-New 9-1-73, Formerly 4-35.04, Amended 2-26-92, Formerly 4-35.004.

4-150.105 Form and Content of Advertisements.

(1) The form and content of a Life Insurance and Annuity Contracts advertisement shall be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. Whether an advertisement has a capacity or tendency to mislead or deceive shall be determined by the Commissioner of Insurance from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence, within the segment of the public to which it is directed.

(2) Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases, whose meanings are clear only by implication or by the consumer's familiarity with insurance terminology, shall not be used.

(3) An insurer must clearly identify its Life Insurance and Annuity Contract as an insurance policy. With respect to any product first filed to be offered to Florida residents on or after the effective date of these rules, a policy trade name must be followed by the words "Insurance Policy" or similar words clearly identifying the fact that an insurance policy is being offered.

(4) No insurer, agent, broker, producer, solicitor or other person shall solicit a resident of this State for the purchase of Life Insurance and Annuity Contracts in connection with or as the result of the use of any advertisement which:

(a) Contains any misleading representations, misrepresentations, or is otherwise untrue, deceptive or misleading with regard to the information imparted, the status, character or representative capacity of such person or the true purpose of the advertisement; or

(b) Otherwise violates the provisions of these rules; or

(c) Otherwise violates the provisions of the Florida Insurance Code.

(5) No insurer, agent, broker, producer, solicitor or other person shall solicit residents of this State for the purchase of Life Insurance and Annuity Contracts through the use of a true or fictitious name which is deceptive or misleading with regard to the status, character, or proprietary or representative capacity of such person or the true purpose of the advertisement.

(6) No insurer, agent, broker, producer, solicitor, or other person shall use a lead generating device or list of prospective insurers compiled therefrom, if the insurer, agent, broker, producer, solicitor or other person knew or reasonably should have known that the lead generating device or list of prospective members was obtained in a manner which violates any provision of the Florida Insurance Code or otherwise violates the provisions of these Rules. No list of prospective insureds may be purchased unless the purchaser requests from the seller any lead generating devices that were used to compile the list and obtains a specimen copy of any such devices that are disclosed.

(7) The contents of all advertisements, lead generating devices, and lists of prospective insureds, regardless of by whom prepared, created, designed or presented, shall be the responsibility of the insurers benefiting directly or indirectly from its use, if the insurer either requested the preparation of, or reasonably should have known of the content of the advertisement lead generating device or list of prospective insureds.

(8) Each solicitation of coverage which insures a Florida resident shall be from and contain the name of a Florida licensed agent.

(9) No insurer, agent, broker, producer, solicitor or other person shall effectuate insurance coverage prior to a full expla-

nation of the coverage offered and completion of an application form.

(10) A lead generating device conducted on behalf of an insurer or agent shall contain the name of the insurer or agent benefiting directly or indirectly from its use.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 624.428, 626.112, 626.784, 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.05, Amended 6-12-88, 2-26-92, Formerly 4-35.005.

4-150.106 Disclosure Requirements for Annuity Contract Advertisements. In addition to the requirements of 4-150.104 and 4-150.105, advertisements of annuity contracts shall be subject to the following requirements:

(1) Advertisements of annuities containing a rate to be earned, including but not limited to interest rates or rates of return, are prohibited unless all limitations and conditions which affect the ultimate rate of return earned by the policyholder/annuitant are disclosed prominently and conspicuously with equal emphasis to describe the interest rate or rate of return. The disclosure shall include:

(a) premium expense charges, if any;

(b) administrative charges, if any;

(c) the full surrender charge, year by year; and

(d) any policy fees.

(2) Advertisements of two-tier annuities shall disclose:

(a) the interest rate on annuity accumulation fund;

(b) the interest rate for cash value accumulation fund; and

(c) the planned interest rate that will apply on the maturity date of annuitization.

(3) An annuity advertisement shall not refer to an annuity as a CD annuity, or in any terms that would lead a prospective

purchaser to believe it is a negotiable instrument or anything other than an annuity issued by a life insurance company.

Specific Authority 624.308, 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (l), 626.9641(1) FS. History-New 2-26-92, Formerly 4-35.0051.

(a) No advertisement shall omit information or use words, phrases, statements, references or illustrations if such omission or such use has the capacity, tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy or contract benefit payable, loss covered or premium payable

4-150.107 Advertisements of Proceeds Payable, Premiums Payable, or Limited, Graded, or Modified Features

(1) Deceptive Words, Phrases, or Illustrations Prohibited

(a) No advertisement shall omit information or use words, phrases, statements, references or illustrations if such omission or such use has the capacity, tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy or contract benefit payable, loss covered or premium payable. The fact that the policy or contract offered is made available to a prospective insured for inspection prior to consummation of the sale or an offer is made to refund the premium if the purchaser is not satisfied, does not remedy misleading statements.

(b) Invitations to contract must clearly reflect the insurer, the agent, the policy form number(s), the type plan, premium payable, payment period, and if applicable, changes in face amounts and premiums.

(c) A simultaneous disclosure of the plan of insurance being offered shall be made in close proximity to the advertised face and premium amounts.

(d) An advertisement of life insurance sold by direct response shall not contain the phrase "no salesman will call," or "no agent will call," or "by eliminating the agent and/or commission we can offer this low cost plan," or similar wording in a misleading manner.

(e) Full benefit policies or contracts may use the term "non-medical" or "no medical examination required" or similar terms where issue is not guaranteed, but this statement shall be accompanied by a further disclosure that health questions are required and that issuance of the policy or contract may depend upon evidence of insurability.

(f) A full explanation must be made of the use of units in which a common premium is specified and varying face amounts according to age are described.

(g) An advertisement which is an invitation to contract shall disclose those limitations affecting the basic provisions of the policy.

(h) An advertisement which also is an invitation to join an association, trust, or discretionary group may solicit insurance coverage on aseparate and distinct application which requires separate signatures for each application. The insurance program must be presented so as not to mislead or deceive the prospective members regarding the fact that they are purchasing insurance as well as applying for membership, if that is the case.

(2) Limited, Graded or Modified Features.

(a) An advertisement for a policy or contract containing graded, modified or other limiting benefits shall fairly and accurately describe such negative features.

(b) If an insurer fails to require evidence of insurability as a condition for issuance of a policy or contract with graded, modified, or other limiting benefits an advertisement of such policy or contract shall not state or imply that the applicant's physical condition or medical history will not affect the issuance

of the policy or contract or payment of a claim thereunder. This rule prohibits the use of the phrases, "no medical examination required," "no health questions asked," and phrases of a similar import in a misleading manner, but does not prohibit explaining "guarantee issue" as long as it is done contiguous to and in a manner as prominent as the term being defined.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.06, Amended 6-12-88, 2-26-92, Formerly 4-35.006.

4-150.108 Necessity for Disclosing Policy Provisions Relating to Renewability, Cancellability, and Termination. An advertisement which is an invitation to contract shall disclose the provisions relating to renewability, cancellability, and termination and any modification of benefits, losses covered or premiums because of age or for other reasons, in a manner which shall not minimize or render obscure the qualifying conditions.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 6-12-88, Formerly 4-35.0061.

4-150.109 Use of Dividends.

(1) An advertisement shall not be used that utilizes or describes dividends in a manner which is misleading or has a tendency to mislead.

(2) An advertisement shall not directly or indirectly state or imply that the amount of dividends or divisible surplus is guaranteed; nor shall such advertisement state or imply that a policyholder will profit by the growth of the company.

(3) Any comparison between participating and non-participating policies or contracts must be true and accurate.

Specific Authority 624.308 FS. Law Implemented 626.9541(1), (2) FS. History-New 9-1-73, Formerly 4-35.07, 4-

35.007.

4-150.110 Testimonials or Endorsements by Third Parties.

(1) Testimonials and endorsements used in advertisements must be genuine, represent the current opinion of the author, be applicable to the policy advertised and be accurately reproduced. The insurer, in using a testimonial or endorsement, makes as its own all of the statements contained therein, and the advertisement, including such statements, is subject to all the provisions of these rules. When a testimonial or endorsement is used more than one year after it was originally given, a confirmation must be obtained.

(2) A person shall be deemed a "spokesperson" if the person making a testimonial, or endorsement:

(a) Has a financial interest in the insurer or a related entity as a stockholder, director, officer, employee, or otherwise; or

(b) Is an entity formed by the insurer, is owned or controlled by the insurer, its employees, or the person or persons who own or control the insurer; or

(c) Is in a policy-making position who is affiliated with the insurer in any of the above described capacities; or

(d) Is in any way directly or indirectly compensated for making a testimonial or endorsement.

(3) Any person acting as a spokesperson, as defined in the preceding paragraph, who performs any of the following acts in an advertisement shall be considered soliciting an insurance product, and such person shall be a licensed insurance agent pursuant to the Florida Insurance Code:

(a) Solicits insurance or procures applications; or

(b) Engages or holds himself out as engaging in the business of analyzing or abstracting insurance policies; or

(c) Engages in counseling, advising, or giving opinions to persons relative to insurance contracts; or

(d) Performs an invitation to contract, except where performed by a company officer in a manner which does not violate Section 626.112(4), Florida Statutes.

(4) The fact of a financial interest or the proprietary or representative capacity of a spokesperson shall be disclosed in an advertisement and shall be accomplished in the introductory portion of the testimonial or endorsement in the same form and with equal prominence thereto. If a spokesperson is directly or indirectly compensated for making a testimonial, endorsement or appraisal, such fact shall be disclosed by use of the phrase "Paid Endorsement" or words of similar import in a type style and size that is at least equal to that used for the spokesperson's name or the body of the testimonial or endorsement, whichever is larger. In the case of television or radio advertising, the required disclosure must be accomplished in the introductory portion of the advertisement and must be given prominence, and if printed must be presented in a type style and size that is at least equal to the largest type otherwise used in the advertisement. The use of the phrase "Paid Endorsement" is not required where the spokesperson is a company officer who is paid generally but not specifically for making the advertisement.

(5) The disclosure requirements of this rule shall not apply where the sole financial interest or compensation of a spokesperson, for all testimonials or endorsements made on behalf of the insurer, consists of the payment of union "scale" wages required by union rules, and if the payment is actually for such "scale" for TV or radio performances.

(6) An advertisement shall not state or imply that an insurer or a policy or contract has been approved or endorsed by any individual, group of individuals, society, association, organization, governmental agency or other entity, unless such is the fact, and unless any proprietary relationship between an organization

and the insurer is disclosed. If the entity making the endorsement or testimonial has been formed by the insurer or is owned or controlled by the insurer, or the person or persons who own or control the insurer, such fact shall be disclosed in the advertisement. If the insurer or an officer of the insurer formed or controls the association, or holds any policy-making position in the association, that fact must be disclosed.

(7) When a testimonial refers to benefits received under a policy for a specific claim, the claim data, including claim number, date of loss, and other pertinent information shall be retained by the insurer for inspection for a period of four years or until the filing of the next regular report of examination of the insurer, whichever is the longer period of time. The use of testimonials which do not correctly reflect the present practices of the insurer or which are not applicable to the policy or benefits being advertised is not permissible.

(8) The provisions of subsections (2), (3) and (4) of this section shall not apply to a written endorsement which does not describe specific benefits, coverages or premiums and which is made by an association of individuals which:

(a) has been in existence for more than one year prior to making the written endorsement; and

(b) is formed for purposes other than soliciting insurance; and

(c) has a valid and bona fide governing constitution and by-laws; and

(d) has as its principal purpose some goal or objective other than providing or soliciting insurance,

as determined by the Insurance Commissioner in accordance with the procedures and requirements of Chapter 120, Florida Statutes, the Administrative Procedure Act.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.051, 626.784, 626.9541(1)(a), (b), (e), (k), (l),

626.9641(1) FS. History-New 9-1-73, Formerly 4-35.08, Amended 6-12-88, Formerly 4-35.008.

4-150.111 Use of Statistics.

(1) An advertisement relating to the dollar amounts of claims paid, the number of persons insured, total amount of insurance in force, relative standing, or similar statistical information relating to any insurer or policy or contract shall not use irrelevant facts, and shall not be used unless it accurately reflects all of the relevant facts. Such an advertisement shall not imply that such statistics are derived from the policy or contract advertised unless such is the fact, and when applicable to other policies or contracts or plans shall specifically so state.

(a) An advertisement shall specifically identify the policy to which statistics relate and, where statistics are given which are applicable to a different policy, it must be stated clearly that the data do not relate to the policy being advertised.

(b) An advertisement shall not contain statements which are untrue in fact, or by implication misleading with respect to the assets, corporate structure, financial standing, age or relative position of the insurer in the insurance business.

(2) An advertisement shall not represent or imply that claim settlements by the insurer are "liberal" or "generous", or use words of similar import, or state or imply that claim settlements are or will be beyond the actual terms of the contract. An unusual amount paid for a unique claim for the policy advertised is misleading and shall not be used.

(3) The source of any statistics used in an advertisement shall be identified in such advertisement.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.09, Amended 6-12-88, Formerly 4-35.009.

4-150.112 Disparaging Comparisons and Statements.

(1) An advertisement shall not directly or indirectly make unfair or incomplete comparisons of policies or contracts or benefits or comparisons of non-comparable policies or contracts of other insurers, and shall not disparage competitors, their policies or contracts, services or business methods, and shall not disparage or unfairly minimize competing methods of marketing insurance.

(2) An advertisement should not contain statements such as "no red tape" or "here is all you do to receive benefits."

(3) Advertisements which state or imply that competing insurance coverages customarily contain certain exceptions, reductions or limitations not contained in the advertised policies are unacceptable unless such exceptions, reductions or limitations are contained in a substantial majority of such competing coverage.

(4) Advertisements which state or imply in a misleading or incomplete manner that an insurer's premiums are lower or that its loss ratios are higher because its organizational structure differs from that of competing insurers shall not be used.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.10, Amended 6-12-88, Formerly 4-35.010.

4-150.113 Jurisdictional Licensing and Status of Insurer.

(1) An advertisement which is intended to be seen or heard beyond the limits of the jurisdiction in which the insurer is licensed shall not imply licensing beyond those limits.

(2) An advertisement shall not create the impression directly or indirectly that the insurer, its financial condition or status, or the payment of its claims, or the merits, desirability, or advisability of its policy or contract forms or kinds of plans

of insurance are approved, endorsed, or accredited by any division or agency of this State or the United States Government or if such relationship exists, such advertisement shall not exaggerate or otherwise be misleading with respect to the nature or extent of such relationship. This shall not include those cases where permission is necessary to transact insurance within military installations.

(3) An advertisement shall not imply in a misleading manner that approval, endorsement, or accreditation of policy forms or advertising has been granted by any division or agency of the state or federal government. "Approval" of either policy forms or advertising shall not be used by an insurer to imply or state that a governmental agency has endorsed or recommended the insurer, its policies, advertising or its financial conditions.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.11, Amended 6-12-88, Formerly 4-35.011.

4-150.114 Identity of Insurer.

(1) The name of the actual insurer shall be stated in all of its advertisements. The form number or numbers of the policy advertised shall be stated in any invitation to contract. An advertisement shall not use a trade name, any insurance group designation, name of the parent company of the insurer, name of a particular division of the insurer, service mark, slogan, symbol or other device which would have the capacity or tendency to mislead or deceive as to the true identity of the insurer or create the impression that the parent company would have any responsibility for the financial obligation of the Insurance Company.

(2) No advertisement shall use any combination of words, symbols, or physical materials which by their content, phraseology, shape, color or other characteristics, are so similar to

combination of words, symbols, or physical materials used by agencies of the federal government or of this State, or otherwise appear to be of such a nature that it tends to confuse or mislead prospective insureds into believing that the solicitation is in some manner connected with an agency of the municipal, county, state, or federal government, or if such relationship exists, such advertisement shall not exaggerate or otherwise mislead with respect to the nature or extent of such relationship.

(3) Advertisements, envelopes, or stationery which utilize words, letters, initials, symbols, or other devices which are so similar to those used by governmental agencies or other insurers are not permitted if they may tend to mislead or confuse the public into believing:

(a) that the advertised coverages are somehow provided by or are endorsed by such governmental agencies or such other insurers; or

(b) that the advertiser is the same as, is connected with, or is endorsed by such governmental agencies or such other insurers.

(4) No advertisement shall use the name of a state or a political subdivision thereof in a policy name or description.

(5) No advertisement in the form of envelopes or stationery of any kind may use any name, service mark, slogan, symbol, or any device in such a manner that implies that the insurer or the policy advertised, or that any agent who may call upon the consumer as a result of the advertisement is connected with a governmental agency.

(6) The use of letters, initials, or symbols of the corporate name or a trademark that would have the tendency or capacity to mislead or deceive the public as to the true identity of the insurer is prohibited unless the true, correct and complete name of the insurer is in close conjunction and in the same size type

as the letters, initials, or symbols of the corporate name or trademark.

(7) The use of the name of an agency or other nomenclature in type, size and location so as to have the capacity and tendency to mislead or deceive as to the true identity of the insurer is prohibited.

(8) The use of an address so as to mislead or deceive as to the true identity of the insurer or any other entity or its location or licensing status is prohibited.

(9) No insurer may use, in the trade name of its insurance policy, any terminology or words so similar to the name of a governmental agency or governmental program as to have the tendency to confuse, deceive or mislead the prospective purchaser.

(10) All advertisements used by agents, producers, brokers or solicitors of an insurer must have prior written approval or prior oral approval with subsequent written confirmation of approval by the insurer.

(11) An agent who makes contact with a consumer, as a result of acquiring that consumer's name from a lead generating device or from a list of prospective consumers compiled therefrom, or from an entity or individual providing such services, must disclose such fact in the initial contact with the consumer.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.12, Amended 6-12-88, Formerly 4-35.012.

4-150.115 Group or Quasi-Group Implications.

(1) An advertisement of a particular policy or contract shall not state or imply that prospective insureds become group or quasi-group members covered under a group policy or contract and as such enjoy special rates or underwriting privileges, unless

such is the fact. The term "enrollment" shall not be used except in connection with the offer of group insurance.

(2) No solicitation of a particular class, such as governmental employees, which state or imply that their occupational status of group members entitles them to reduced rates on a group or other basis when, in fact, the policy being advertised is sold only on an individual basis at regular rates.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.13, Amended 6-12-88, Formerly 4-35.013.

4-150.116 Introductory, Initial, or Special Offers.

(1) An advertisement of an individual policy shall not directly or by implication represent that a contract or combination of contracts is an introductory, initial, or special offer, or that applicants will receive substantial advantages not available at a later date, or that the offer is available only to a specified group or individuals, unless such is the fact. An advertisement shall not contain phrases describing an application period as "special", "limited", or similar words or phrases when the insurer uses such application or periods as the usual method of advertising Life Insurance and Annuity Contracts.

(2) An application period during which a particular insurance product may be purchased on an individual basis shall not be offered within this State unless there has been a lapse of not less than six months between the close of the immediately preceding application period for the same product and the opening of the new application period. The advertisement shall indicate the date by which the applicant must mail the application, which shall be not less than ten days and not more than forty days from the date that such application period is advertised for the first time. This rule applies to all advertising media, i.e., mail, newspapers, radio, television, magazines, and peri-

odicals, by any one insurer. This prohibition shall not be applicable to solicitations of employees or members of a particular group or association which otherwise would be eligible under specific provisions of the insurance code for group insurance. The phrase "any one insurer" includes all the affiliated companies of a group of insurance companies under common management or control.

(3) This rule does not require separation by 6 months of application periods for the same insurance product in this State if the advertising material is directed by an admitted insurer to persons by direct mail on the basis that a common relationship exists with more than one entity. Examples of such would be a bank and its depositors, a department store to its charge account customers, or an oil company to its credit card holders, and more than one of such organizations is sponsoring such insurance product at different times if providing such insurance under such a method is not otherwise prohibited by law. However, the 6-month rule does apply to one specific sponsor to the same persons in this State on the basis of their status as customers of that one specific entity only.

(4) This rule prohibits any statement or implication to the effect that only a specific number of policies will be sold, or that a time is fixed for the discontinuance of the sale of the particular policy advertised because of special advantages available in the policy, unless such is the fact.

(5) The phrase "a particular insurance product" in Paragraph (2) of this Section means an insurance policy which provides substantially different benefits than those contained in any other policy. Different terms of renewability, an increase or decrease in the dollar amounts of benefits, or an increase or decrease in any elimination period or waiting period from those available during an application period for another policy shall not be sufficient to constitute the product being offered as a

different product eligible for concurrent or overlapping application periods.

(6) Except for modified and step rated policies or contracts, an advertisement shall not offer a policy or contract which utilizes a reduced initial premium rate.

(7) Meaningless awards, such as a "safe drivers award" shall not be used in connection with advertisements of Life Insurance and Annuity Contracts.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.14, Amended 6-12-88, Formerly 4-35.014.

4-150.117 Statements about an Insurer. An advertisement shall not contain statements which are untrue in fact, or by implication misleading, with respect to the assets, corporate structure, financial standing, age or relative position of insurer in the insurance business. An advertisement shall not contain a recommendation by any commercial rating system unless it clearly indicates the purpose of the recommendation and the limitations of the scope and extent of the recommendations. An advertisement shall not imply that a holding company or subsidiary of an insurer is a separate entity and responsible for the insurer's financial condition or contractual obligations unless such is the fact and it is fully disclosed.

Specific Authority 624.308 FS. Law Implemented 626.9641(1), (2) FS. History-New 9-1-73, Formerly 4-35.15, Formerly 4-35.015.

4-150.118 Application in Advertisement. Every application for an individual policy or in-state group life insurance policy or an annuity contract, or enrollment form for an out-of-state group contract which does not comply with Section 627.6515(2), F.S., must be taken by a Florida resident agent. Therefore, to assure compliance with Florida Statutes, no adver-

tisement for life insurance or an annuity contract in this State containing an application for a life insurance policy or annuity contract either for individual coverage, coverage under an in-state group policy, or an out-of-state group policy which does not comply with Section 627.6515(2), F.S., shall be used unless such application contains the name of the Florida resident agent or space for the Florida resident agent's signature, and, the completed application shall be returned to the Florida resident agent.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 624.428, 626.112, 626.784, 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1), 627.5515(6) FS. History-New 9-1-73, Formerly 4-35.16, Amended 6-12-88, Formerly 4-35.016.

4-150.119 Enforcement Procedures.

(1) Advertising File. Each insurer shall maintain at its home or principal office a complete file containing every printed, published or prepared advertisement of its individual policies and typical printed, published, or prepared advertisement of its group policies hereafter disseminated in this State with a notation attached to each such advertisement which shall indicate the manner and extent of distribution and the form number of any policy advertised. Such file shall be available for inspection by this Department. All such advertisements shall be maintained in said file for a period of either four years or until the filing of the next regular report or examination of the insurer, whichever is the longer period of time.

(2) Certificate of Compliance. Each insurer required to file an Annual Statement which is now or which hereafter becomes subject to the provisions of these rules must file with this Department with its Annual Statement a Certificate of Compliance executed by an authorized officer of the insurer wherein it is stated that to the best of his knowledge, information and belief the advertisements which were disseminated by the insurer during the preceding statement year complied or were made to

comply in all respects with the provisions of these rules and the Insurance Laws of this State as implemented and interpreted by these rules.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.17, Amended 6-12-88, Formerly 4-35.017.

4-150.120 Filing for Review.

(1) The Commissioner may, in his discretion, require the filing with the Department, for review prior to use, of any life insurance and annuity contract advertising material of an insurer or particular insurers. Such advertising material must be filed by the insurer with this Department not less than thirty (30) days prior to the date the insurer desires to use the advertisement.

(2) An insurer shall file with the Department any or all life insurance and annuity contract advertising material, except for Institutional Advertisements, used or intended for use in the state, when such advertisement or others which do not materially differ are broadcast via television or radio or transmitted by cable to any area or areas whose aggregate population comprises more than 25% of the total population of the state according to the last decennial census. Such advertisements shall be filed on audio or audio/visual tapes as appropriate using either the actual spokesperson or a "stand-in." An audio/visual tape shall be on VHS format. The advertising material may be filed thirty (30) days prior to the date the insurer intends to use the advertising, or may be filed contemporaneously with the date intended for use. If the insurer files at least thirty (30) days prior to use, and the Department has not issued a preliminary notice of violation within fifteen (15) days after such filing, and there are not material changes in the production of the advertisement, the insurer shall not be penalized for any use of the advertisement which occurs within thirty (30) days after receipt of any sub-

sequent preliminary notice asserting that the advertisement is in violation of these rules.

(3) Subsection (2) above, shall be effective sixty (60) days after the effective date of these rules. Subsection (2) shall not apply to advertising material used by an insurer prior to the effective date of these rules; provided, however, the Commissioner may request, in his discretion, that an insurer submit any such advertisement to the Department.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 6-12-88, Formerly 4-35.0171.

4-150.121 Severability Provision. If any section or portion of a section of these rules, or any amendment thereto, or the applicability thereof to any person or circumstance is held invalid by a court, the remainder of the rules, or the applicability of such provision to other persons or circumstances, shall not be affected thereby.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 9-1-73, Formerly 4-35.18, Amended 6-12-88, Formerly 4-35.018.

4-150.122 Prior Rules. These rules supersede and constitute a revision of all prior rules pertaining to solicitation and sale of Life Insurance and Annuity Contracts.

Specific Authority 624.308(1), 626.9611 FS. Law Implemented 626.9541(1)(a), (b), (e), (k), (l), 626.9641(1) FS. History-New 6-12-88, Formerly 4-35.020.